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LIBRI QUATTUOR

WITH INTRODUCTIONS, COMMENTARY, AND EXCURSUS

BY

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PREFACE

THE text which I have followed is that published by Krueger in his and Mommsen's edition of the *Corpus Iuris Civilis*: and in writing the Introduction, Commentary, and Excursus, I hope I have consulted the best and most recent authorities; above all, I must mention Girard's *Manuel élémentaire de Droit Romain* (4th edition), a masterly treatise of which it is to be hoped an English translation may before long be published. The regret which I have expressed in the Preface to earlier editions as to the lack of good Manuals in English upon the elements of Roman Law appears to be losing its justification: Mr. W. W. Buckland's *Elementary Principles of Private Roman Law*, which from his earlier work on the *Roman Law of Slavery* may be confidently expected to be of great value, has just been published, and it is believed that we may not have to wait long for results of equal importance from the Oxford School of Law.

The chief difference between this and the earlier editions is that I have now printed those passages in the Institutes of Justinian which are substantially taken from those of Gaius in heavier type, so that the student can have no difficulty in seeing the relation between the two texts. I believe that this device was invented by Professor Holland, K.C., to whose courtesy I owe it that I am able to follow the same plan without incurring the charge of having

appropriated another writer's ideas without permission, and I desire to express in the fullest manner the obligation under which I feel to him for his kindness in the matter. At the same time I wish to explain that my object has been somewhat different from that aimed at by him in his edition of the Institutes of Justinian as a recension of the Institutes of Gaius, in which not a syllable is attributed to the earlier writer which, in point of fact, he did not write. My own, as is said above, is to show what passages in Justinian are taken 'substantially' from Gaius: so that, for instance, if the latter says, 'if Titius steals a coat from Seius', and Justinian transforms this into 'if you steal a waistcoat from me', I have not hesitated to attribute the latter words to the earlier writer. On the other hand, I have been careful, even in passages which are taken substantially from him, to indicate changes of law; so that (e.g.) where the present tense of Gaius becomes the imperfect of Justinian (as in *Inst.* ii. 23. 6) the verb is printed in ordinary type.

J. B. M.

November, 1912.

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GENERAL INTRODUCTION

The purpose of this Introduction is to give as full an account as is practicable, in a work such as this edition of the Institutes, of the history of Roman Law and Legislation. In order to allow the largest possible amount of space to strictly legal topics, constitutional history has been avoided, except so far as it seemed that these could not be adequately understood without occasionally touching upon it. It is of course impossible to write on the history of any legislation without taking some notice of the persons or bodies by whom legislative functions are or have been exercised; but such digressions from purely legal matters can fortunately be confined within tolerably narrow limits, because the Roman system owed so large a part of its development in point of matter to the praetor, whose powers, so far as they were legislative, were exercised indirectly, and it may almost be said covertly, and in point of form to the jurists, whose constitutional position, despite their direct influence on law, was in reality quite unimportant.

So far as legislation goes, what will here be said is little more than a commentary, written in historical sequence, on the seven sources of law from which the Roman system is said (Inst. i. 2. 3) to be derived. As regards the system itself, apart from the agencies by which it was directly developed, or viewed from within rather than from without, the principal topics which will be treated are the relation of public and private law at Rome; the influence of caste, or, more precisely, of the patrician and plebeian elements respectively on the material character of the system; the 'duplication of institutions' which resulted from the co-existence of a purely national with what we may perhaps call a cosmopolitan legislative organ; the gradual absorption by what was cosmopolitan of what was purely national; and the development and character of the Roman scientific or philosophical jurisprudence. Finally, the legislative work of Justinian will be described with tolerable fullness, concluding, in particular, with an examination of the scope and system of the Institutes.

Of the form of the earliest Roman law it is possible to speak more positively than of its matter and contents. The first trace of genuine legislation is to be found in the Twelve Tables, which the mythical

founding of the city preceded by more than three hundred years. During these three centuries, the law by which the Romans were governed was unwritten ; it was pure custom handed down by tradition from past generations, and doubtless identical in origin with the usages of the primitive Aryan stock. Modern comparative jurisprudence has established resemblances so striking between the usages of the earliest known inhabitants of Rome, of the primitive Irish, and of those Asiatic Aryan peoples which have been most open to observation, that (while admitting that it was modified on every side by such agencies as climate and the circumstances of a military people ever in arms) we must allow that the customary law of Rome, from which a new departure was taken at the time of the Twelve Tables, was of very great antiquity, though conjectures as to its age are no less unprofitable than idle. How the custom was preserved, and protected from contamination by foreign elements, we know from writers on the early history of Rome ; it was jealously treasured up by the college of Pontifices, who were possibly the first judges in all matters relating to the family and property, and who thereby acquired the title of 'guardians of the law'; 'omnium tamen harum (legum) et interpretandi scientia et actiones apud collegium pontificum erant, ex quibus constituebatur, quis quoque anno praeesset privatis' (Dig. 1. 2. 2. 6).

The statement that there was nothing in the nature of statute law until the enactment of the Twelve Tables may seem to be contradicted by the existence of the so-called 'leges regiae', of which however we know little that is certain. 'Leges quasdam et ipse (Romulus) curiatas ad populum tulit. Tulerunt et sequentes reges, quae omnes conscriptae extant in libro Sexti Papirii, qui fuit illis temporibus . . . Is liber, ut diximus, appellatur ius civile Papirianum, non quia Papirius de suo quidquam ibi adiecit, sed quod leges sine ordine latas in unum composuit' (Pomponius in Dig. 1. 2. 2. 2). From this it would appear that Sextus Papirius, who, according to Dionysius (iii. 36), was a pontifex, made a compilation of these leges regiae in the reign of the last of the kings. Dionysius also tells us that, after the expulsion of the kings, Papirius re-established those of which Numa was said to be the author ; and we know a commentary to have been written on his compilation towards the end of the Republic by Granius Flaccus, which is quoted in Dig. 50. 16. 144. It is clear, from the passage cited above from the Digest, that the jurist Pomponius assumed the identity of the work, on which Flaccus based his commentary, with the original 'ius civile Papirianum'; but the

truth of his assumption is much doubted by later historians. So far as we are able to determine their character, it would seem that many of these 'leges regiae' related to matters of religious ritual, and that the sanction of even those which laid down rules of law proper was sacral, not political, so that it is most unlikely that they were clothed with the force of the law by the comitia.

The application of the word 'curiatae' to these leges in the passage last cited from the Digest leads one on to describe the origin and early history of the comitia or legislative assemblies of Rome. The earliest of these was the comitia curiata, which, when convoked for certain kinds of business, such as the sanctioning of testaments (Inst. ii. 10. 1), was called comitia calata. Whatever opinion may be held as to the names and ethnic origin of the three tribes (Ramnes, Luceres, and Tities or Quirites) from whose union the Roman state is mythically said to have sprung, it cannot be denied that the populus Romanus, when we first know anything certain about it, actually consisted of three tribes, each of which comprised ten curiae, while each curia consisted of a number of gentes, and each gens of an indefinite number of families, between which there was originally perhaps a genuine tie of blood, which gradually became a mere fiction, respected and supported for the sake of the ancient family worship and religious rites. The family was thus not merely a microcosm of the state; it was the foundation on which were based all the privileges which the Roman citizen enjoyed within the state; the populus contained the tribe, the tribe the curia, the curia the gens, the gens the family, the family the individual; to belong to the first a man must also belong to the last member of the series; or rather we should say that primitive law takes little account of individuals, but of groups, that is to say, of families or gentes only.

The comitia curiata, and in fact the whole constitution, was based on this family, gentile, and tribal organization. The comitia curiata, which was the popular assembly, was composed of all the males of the gentes, without any distinction between father and those in his power; it was thus a gathering arranged on the principle of real or fictitious relationship (Gellius xv. 27 'quum ex generibus hominum suffragium feratur, curiata comitia esse'), in which the voting was 'curiatim', each curia expressing its opinion on the matter in hand in turn. But the services of the great majority of able-bodied citizens were constantly required by the military exigencies of a state which as yet drew no distinction between a stranger and

an enemy; consequently, to superintend the general conduct of affairs, there was a council or senatus consisting, after Tarquinius Priscus, of three hundred of the patres gentium, a hundred from each tribe. The principles of democracy and oligarchy were thus both represented, and two examples may be quoted to illustrate the 'system of checks and balances' by which harmony was preserved between them. The nomination of the king, or supreme executive magistrate, lay with the senate, but required confirmation by the comitia, which, by a lex curiata (Inst. i. 2. 6), invested him with an imperium of life-long duration, whereby he became, externally, the leader of the host in arms, internally, the depositary of the highest administrative functions of government. On the other hand, it was to the populus alone, assembled in its comitia, that the legislative function belonged, though this function could not be called into action without the authority of the senate, which alone possessed the right of submitting subjects for deliberation, and of initiating changes of law; it was the populus which decided upon war and peace, and which chose the king nominally, and the senators actually: but in the exercise of all these rights it had to wait for action to be first taken by the probouleutic body, whose members it chose itself, but whose personal constitution, when once selected, it could modify only in a constitutional manner.

The origin of the other comitia was later in date. So far nothing has been said to suggest that there were any inhabitants of Roman territory who were not citizens—either themselves heads of families, or subject to the potestas of a paterfamilias. From the very first, however, there seems to have been a number of free persons dwelling around the three tribes, and yet not belonging to them; abiding on Roman soil, and therefore subject to the dominion of Rome, yet possessed of no civil rights whatever. Some sort of legal status it was deemed requisite to give them, and this was done by placing them in immediate relation to some paterfamilias, whereby he became their patron, they his clients. But with the family of their patron they had no connection; their connection was with his gens; they took the gentile name and became his 'gentiles'. In this way they were brought within the protection of the law, as dependents of a citizen; an object which could not have been secured except by some such device, for the primitive Roman law recognised no claim to its support unless the claimant could in some way show that he was within the pale of the tribal constitution. But the clientes acquired no political rights, though the public duty of military

service was imposed upon them, and a considerable force of infantry was thus added to the resources of the state.

This process, however, of attaching all peregrini residing on Roman soil to the populus by the tie of clientela could not be prolonged indefinitely. Circumstances were gradually augmenting the number of non-citizens so largely as to necessitate some new mode of dealing with these classes. The military temper and strong organization of the Roman people resulted in a continuous addition of territory to the domains of the city; little districts, principally of Latin population, were constantly being annexed, and their villages razed, the inhabitants being encouraged to flock towards Rome, because thus they could be most easily cowed into obedience and hindered from rebellion. These immigrants were at first settled on the stretch of land, bordering the three hills of the populus, known from them as esquiliae; as their numbers swelled, king Ancus, who was afterwards honoured as the founder of the plebs ('Romuli Ancique gentem' Catullus 34), assigned them the Aventine as a dwelling-place. This was the population which became the plebs, and which played so important a part in the strictly legal, no less than in the constitutional, history of Rome. The question how to deal with them became daily a more pressing political problem. To incorporate them into the existing tribe-economy was, to Roman ideas, quite out of the question; the populus, being based upon the gentes, was a kind of close corporation whose constitution was limited by the definite number of gentile aggregates. The plebs then must remain a body apart from the populus, and therefore its members could have no political rights. But there seemed no reason why the private should not be separated from the public elements of the law; and the result—whether it should be ascribed to a happy accident, or to the deep-seated legal instincts of the Roman race—was that the plebs was made a participator in all those rights which, in the later law, are usually described as the private rights involved in the Roman civitas. Thus the plebeians had the commercium, and could acquire property by mancipatio; they shared the family law of Rome, except so far as this was of a public character; that is to say, such parts of family law as preserved and perpetuated the tie between family and populus had no relation to them whatever. The Roman principle of political exclusion led to considerable results in the field of pure law; it produced a duplication of institutions. Thus, the wife of a plebeian could be in his manus, but they could not be married by confarreatio, which was

publici iuris (see Commentary on i. 10 pr.): hence the two other modes in which manus could be produced, coemptio and usus (Gaius i. 110), are by some supposed to have been of plebeian origin. Again, the plebeian could have his children under his potestas, but it may be doubted whether he could adopt by adrogation, which was an act of high political and religious significance, effected in the comitia; hence it is probably to the plebs that we should ascribe the form of adoption imperio magistratus (Inst. i. 11. 1); finally, as a plebeian could not, at any rate personally, submit his testament to the comitia calata for legislative sanction, it has been conjectured that this was the origin of the will 'per aes et libram' (Gaius ii. 102), the validity of which was implicitly confirmed by the Twelve Tables. In fact, the communication of private rights to the plebs led to a vast development of private law. Had the Roman populus contrived to live apart by itself in arrogant isolation: had it stubbornly refused to recognise a tittle of right in any man who was not a member of itself; had it, in short, not happily hit upon the device of separating the public from the private portion of the ius Romanum, the history of Roman jurisprudence would in all probability have been far different from what it has been.[1]

Under Servius Tullius, the constitution was to a great degree revolutionised by two reforms, which in the end completely altered the political centre of gravity. The importance of the plebs, on account no less of its wealth and military use as infantry than of its numbers, became daily more obvious; it was clear that the time at which its political position should be recognised could not be long deferred. It was Servius, of whom it is related (Cic. de Republ. ii. 21) that he attained the royal dignity by plebeian support, who practically effected its recognition. It has been already said that the plebs could not possibly be brought within the political constitution by means of the personal principle of family, gentile, and tribal connection. Servius thus had to cast about for a new system of political association, and a basis for this was found in the principle of local contiguity. He divided the territory of Rome into local tribes (or rather 'parishes') each with its own president, each occupying a certain district, and each responsible for a certain quota of taxation and a certain military contingent. Four of these were 'tribus urbanae', others, the number

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[1] For a different view of the original position of the plebs, in the main derived from Mommsen, see the article 'Rome' in the Encyclopaedia Britannica, ninth edition, p. 736.

of which seems to have fluctuated with circumstances, 'tribus rusticae'; but the former only had any political influence until the plebeian secession, though it is possible that for political purposes the members of the country belonged to the town tribes also. Nor can it be reasonably doubted—in spite of the dissent of Niebuhr—that this tribal arrangement comprehended the patricians, the old populus in its three tribes. Its very object was to make the plebs an integral element in the state, and this could not have been done unless the reform of Servius had embraced every citizen, every inch of Roman soil. In point of fact, the new arrangement was based on the principle of local contiguity, and therefore comprehended the whole of Roman territory, large portions of which were in patrician occupation.

The second reform of Servius Tullius in its origin was military, but it eventually led to an important constitutional development. By the new tribal constitution, the old relation between infantry and cavalry, according to which the former had been but a subordinate appendage of the latter, had been superseded. Nevertheless, the distinction of cavalry and infantry still remained a distinction of caste; the patrician alone could be an eques; the plebeian, however rich he might be, was condemned to serve on foot. To reduce the prominence of the distinction between plebs and populus, if not to sweep it away altogether, it was necessary to disconnect the military organization from the old constitution of curiae and gentes; to substitute for this principle a new one; to base the military system on a new idea. This new principle, this new idea, were those of timocracy. The leading feature in Servius' second reform was his division of the whole body of freeholders (assidui), which could be called on for infantry service, into five classes, in which each man's position was determined by the amount of his property: at first, no doubt, of his property in land only. The first comprised all those whose property was valued at 100,000 asses and upwards; of the second, the qualification was 75,000 asses; of the third, 50,000; of the fourth, 25,000; of the fifth, 10,000. Those citizens whose means did not qualify them even for this fifth grade, belonged to subsidiary, but of course unimportant classes, known as accensi velati and proletarii. To this proprietary classification corresponded an arrangement of the fighting men in centuries or companies of a hundred. Of cavalry there were eighteen centuries, six of which were drawn from the old populus, in accordance with the plan of Tarquinius Priscus, and twelve from the plebs. The first of Servius'

new classes furnished eighty-two centuries of heavily-armed infantry; the second, third, and fourth, twenty fighting centuries each, and also a couple of additional companies, consisting of buglers and musicians; thirty centuries were contributed by the fifth class; at each step downwards in the scale the armour became lighter, the equipment less complete. The full number of centuries seems to have been one hundred and ninety-two.

It is, however, the political side of the centurial organization which is of most interest in the history of Roman law, though this was not a working reality until after the expulsion of the kings. The principle which underlay its application to this branch of the national life was this—that a man ought to have an influence in public affairs proportioned to the burdens which he bore in defending the state against its external foes. On the expulsion of the kings we find the centurial organization adapted to a new political assembly, the comitia centuriata, which was destined to throw the old assembly of the patricians at once into the shade, and so engross the discussion of public questions, such as war and peace, legislation as to matters affecting the constitution, the choice of magistrates, and the decision of all judicial proceedings which involved the 'caput' of a Roman citizen. In the comitia centuriata, where each century had a single vote, the influence of the richer middle class had an irresistible preponderance. In the order which furnished cavalry, the patrician votes were outnumbered in the proportion of two to one by those of the plebeians; while the eighty votes of the first of Servius' infantry classes formed a compact political force which could win or lose the day in a contested election, or on a public question upon which opinions differed. The political, however, were not precisely identical with the military centuries; the proportion between the classes was the same, but by the addition of a proletariate suffrage the number of military companies was exceeded by the number of votes in the comitia by one.

With the expulsion of the sons of Tarquinius Superbus (circ. 509 B.C.) the kingly government of Rome came to an end. The act had been that of the patricians; but the plebeians were in full accord with them. The constitutional functions of the king, subject to certain limitations in respect of judicial authority, were vested in two supreme magistrates of co-ordinate authority, who were chosen from year to year, and called at first praetors, and later consuls; of the first two who were elected one was the plebeian L. Junius Brutus. It would seem too that the plebeians now gained the *entrée* to the

senate—at least, henceforward two classes of senators are distinguished—patres and conscripti. But no provision apparently was made to secure an adequate senatorial representation of the plebs, and after Brutus there is no plebeian consul for very many years. This will make it clear at once that, though the plebs commanded an overwhelming majority in the comitia, its political influence in general was far less real than might be supposed. A mine of gunpowder is harmless unless there be some one to apply the match; and the practical helplessness of the plebeians will be comprehended if we remember three facts. In the first place, no citizen could constitutionally bring any matter before the centuries except one or other of the consuls. In the second place, the senate still preserved its probouleutic function already described; that is to say, even a consul could not submit a single question to the comitia until it had previously been discussed by the senate, and its reference to the larger assembly had been approved by that body. Thirdly, it was required that all elective or legislative acts which needed a religious sanction should be confirmed by a lex curiata in the comitia of that name, in which it will be remembered that patricians alone were entitled to take part; such confirmation was essential, for instance, to the validity of consular elections, for on consuls a lex curiata alone could confer the imperium, and of all alterations in the constitution.

The first secession of the plebs (B.C. 494) seems to have been occasioned principally by financial distress. Unsuccessful wars against the allies of the royal family of the Tarquins had largely increased taxation, and taxation fell in the main on the plebeians alone. The story of Athens in the time of Solon was once more repeated. The patricians availed themselves of their comparative freedom from financial burdens to cast the net of usury round the plebs, and the severe form of execution in vogue for debt was abused for political purposes. Returning from a campaign, the plebeian section of the host occupied a hill in the vicinity of Rome, subsequently known as the Mons Sacer, and refused to re-enter the city. There they were joined by the rest of the plebs, and threats uttered of a permanent secession, and of the establishment of an opposition state. The patricians saved themselves from a catastrophe which would have thrown the history of Rome centuries backward, and, in all probability, totally altered its character, by conceding certain reforms, by surrendering certain of their privileges. An agreement was concluded between the two orders, by which the

plebeians were in future to have two special elective magistrates of their own—a number very shortly raised to five, and then to ten—whose office none could hold unless he were himself plebeian. The function of these 'tribunes of the plebs' was to protect members of their own order against the consuls, and those who violated their personal liberty or security were to be outside the law; they were not, like the consuls, magistrates of the Roman people, and therefore could not take the political initiative. Gradually, however, this limited authority was thrown into the shade by the unrestricted right of veto which is so familiar to readers of Roman history, and which eventually enabled the tribune to paralyse the whole machinery of government. This growth of tribunician power was mainly the result of the organization of the plebs as a political force by its new leaders. Assemblies of that order, known as concilia plebis, were summoned by them, in which their grievances were ventilated, and resolutions were carried demanding redress. These could be laid before the Senate by the tribunes, who, though not members of that body in virtue of their office, were permitted for this purpose to appear at the threshold of the building where it held its deliberations: if approved, these proposals could then be referred in the ordinary way to the assembly of the centuries, and thereby become genuine enactments of the sovereign populus.[1] It will shortly be seen that when the jealousies between the plebeians and patricians had abated, these concilia plebis expanded into a new comitia. Measures were also taken to relieve insolvent debtors from their obligations, and promises were made of reforms in this branch of law.

One or two other subjects of plebeian complaint may be here mentioned, along with the half measures by which it was attempted to remedy them, in order to show that the enactment of the Twelve Tables was preceded by a period of discontent and even active agitation, and that the relations of the two parties were still in a sort of ferment, and incapable of satisfactory adjustment except by some constitutional reform of more than ordinary comprehensiveness. Numbers of the leading plebeians were injured by the exclusion of connubium between themselves and the patrician order. Though this anomaly had originally been grounded on political considerations, it was now retained for purposes of mere annoyance only; but the deliverance of the plebeians was not yet. Even now too they were still legally incapable of possessing the ager publicus;

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[1] Valerius Maximus, ii. 2. 7.

and this appeared the more hard, because, on the one hand, their taxation was out of all proportion to that of the patricians, while the possession of the ager publicus was untaxed, and yet, on the other, it was mainly through their own valour that it had become ager publicus at all. Some slight compensation was made for this by a lex Cassia (B.C. 486) which effected a distribution of newly-conquered territory, and placed some restrictions on the patrician enjoyment of the public land. A third grievance was the unlimited power of the magistrates to inflict pecuniary fines; this was curtailed by the leges Menenia, Tarpeia, and Papiria, passed between 460 and 430 B.C. Lastly, the patricians controlled the entire administration of justice; it was the consul who presided over the preliminary stage of every action, and if he did not decide it out of hand, the judges were most usually the patrician decemviri, upon whom this function had been cast by Servius Tullius; it was the pontifices themselves, members of the patrician caste, who interpreted the law, and solved its knotty problems. Moreover, the very enforcement of the law depended on the observance of minute forms and technicalities of which, by reason of their implication with the ius sacrum, the plebeian could know little or nothing. Some slight amelioration of these hard conditions must have been afforded by the lex Pinaria,[1] which belongs to this period, and which, in certain classes of actions (we may suppose, in particular, actions of debt), allowed the parties to choose a single judge, to the exclusion of the magistrates' own jurisdiction and of the decemviral court (Gaius iv. 15). But the class from which the judge was to be chosen seems to have been limited in some way of which we have no certain knowledge; and the chief interest of the lex Pinaria is that it served as a precedent for the principle enunciated by Cicero (pro Cluentio 43) in the words 'neminem voluerunt maiores nostri esse iudicem nisi qui inter adversarios convenisset.'

In the year B.C. 462 the tribune Terentilius had procured a resolution of the plebs, 'ut quinque viri creentur legibus de imperio consulari scribendis,' which the senate refused to send on to the comitia centuriata. Nothing daunted, he proposed, in the next year and in the same way, a codification of the whole law by decemviri. This last hint was taken, after an interval of ten years, by the patricians; they consented (B.C. 451) that the powers of consuls and tribunes should for a while be suspended, and the whole authority

[1] Its date was, according to Huschke, B.C. 472 (Verfassung des Servius, p. 595).

of the state entrusted to ten commissioners, on whom was imposed the task of codifying the public and private law of Rome. In that same year they submitted to the people a code of ten tables, which, along with two tables added in the following year, were accepted, as genuine statute law, by the comitia. These were the celebrated Twelve Tables, described by Livy as 'corpus omnis Romani iuris', and 'fons publici privatique iuris'; as 'finis aequi iuris' by Tacitus, though in reality not so much 'finis' as a fresh starting-point for a new and vigorous legal development. 'Placuit publica auctoritate decem constitui viros, per quos peterentur leges a Graecis civitatibus, et civitas fundaretur legibus, quas in tabulas eboreas (?) perscriptas pro rostris composuerunt, ut possint leges apertius percipi, datumque est eis ius eo anno in civitate summum, uti leges et corrigerent, si opus esset, et interpretarentur, neque provocatio ab eis, sicut a reliquis magistratibus fieret. Et ita ex accedenti appellatae sunt leges duodecim tabularum, quarum ferendarum auctorem fuisse decemviris Hermodorum quendam Ephesium, exulantem in Italia, quidam retulerunt' (Pomponius in Dig. 1. 2. 2. 4).

The allusion to the Ephesian Hermodorus contained in this passage, and the reference (which is confirmed by other writers, e.g. Livy iii. 31, 32, 33, Servius in Verg. Aen. vii. 695) to an embassy of which he was the interpreter, and which the Romans sent to Greece to search out the laws of her cities, and especially those which Solon had given to Athens, has led many historians to believe that a large proportion of the decemviral legislation was derived from foreign sources, and some even to suppose that the whole of it, in substance, was Greek law. It would seem that in point of fact no theory was ever wider of the truth: the foreign influence was trifling, and left little or no trace whatever on the private portion of the code.[1] A consideration of the task of the decemvirs confirms a conclusion suggested by such knowledge as we possess of the result of their labours. To remove the uncertainty of the law, which was an inevitable consequence of its form, as in the main unwritten custom and tradition, and which favoured capriciousness in its administration by the magistrate: so far as possible, to place all freemen, irrespective of their birth or order, on the same footing in respect of legal right and duty; and to put an end to plebeian discontent arising from economical conditions—these were the chief objects to

[1] For a careful examination of this question see M. Voigt, Die xii Tafeln, I. pp. 11 sq., and Cuq, Institutions juridiques des Romains, i. pp. 133–137.

be attained, and it would not seem that their attainment would be promoted by even a liberal adoption of foreign usages. In the extant portions of the Twelve Tables there are unmistakeable traces of the equalising policy: the ius sacrum was to a considerable extent stripped of its exclusive character, and the law of procedure, as to which we have important fragments, was settled upon a basis which gave justice a chance of being fairly administered by saving from magisterial caprice the decision of most points upon which the successful bringing of an action depended. How far the Tables were a complete codification of existing rules must always remain somewhat doubtful. It appears beyond dispute that being intended as an exposition of the general civil law, applicable to all classes alike, they did not regulate practices or institutions peculiar to either order, such as the older forms of marriage and adoption;[1] nor did they include the leges regiae, law and religion having now been differentiated. Much again relating to the effects of legal acts and dispositions, which was matter of common knowledge and formed no subject of dispute, remained, as we might say, 'common law,' the familiar possession of every citizen, and the same remark may be made of many laconic aphorisms similar to others which we know to have been embodied in the Tables. Finally, it may be observed that the enactment of the Twelve Tables is also direct evidence of the independent position which private law had won for itself under plebeian auspices, and at the same time starts it on a new career of development; it was no longer the peculiar province of the plebeian order; but having been sanctioned by the whole populus in its comitia, it began to be looked on more by all parties as the best security for order and prosperity. But this is part of a subject on which there is great diversity of opinion, and to which we shall shortly return—the relation, at Rome, of private to public law.

English lawyers in particular will fully appreciate the advantage which was secured by the expression of the law in a more scientific and therefore more convenient form than that in which it had hitherto been clothed. But it was a still larger boon that provision was made for its being generally known by all citizens who cared to make themselves acquainted with it. Historical analogy would perhaps lead us to suppose that the knowledge of the law had hitherto been engrossed by the patrician caste, as represented by the pontifices, who are described in a passage of Pomponius already cited (Dig.

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[1] E.g. Gaius, iii. 82.

1. 2. 2. 6) as the only masters of the legal rules and forms of procedure at that time binding. But it has already been suggested that private law was to a large degree of plebeian creation, and the sole possession of legal knowledge by a dominant aristocracy is truer of the Greek oligarchies than of Rome, of which we may, with some qualification, accept the view of the German historical school of jurists, who assert that the material law was no secret, being founded on the common legal consciousness (Rechtsbewusstsein) of the nation as evidenced and attested by its usages and customs. Still, it is of no avail to know the law, if one cannot get one's rights protected and enforced by action ; and of the forms of actions, as already observed, the plebeian could know little, through their implication with the ius sacrum. The decemviral legislation introduced simplicity and uniformity into these ; it was exposed in a public place for all to read, and from the fact that in Cicero's boyhood the Roman youth was used to learn the Twelve Tables by heart, it is evident that they were long used as the foundation of a legal education as, in the three centuries and a half preceding the legislation of Justinian, a mastery of the Institutes of Gaius was considered the proper groundwork of an adequate knowledge of the law. For nearly a thousand years they remained the only complete legislation which professed to embrace the whole positive law of Rome, and though in point of fact the greater part of their original substance was repealed or modified by subsequent enactments, the Roman citizen, even under the Empire, always continued to revere them as the solid basis of the noble system of jurisprudence by which all his rights and duties were determined ; and it was only by the great work of Justinian that, nine hundred and eighty-four years after their enactment, they were formally deprived of their authority.

At this point it will be well to pause in order to look back over the centuries behind us and try to ascertain what was the material content and what the scope of the customary law which, as we have seen, was to the early Romans the only rule of life, and which was summed up and (if we may use the expression) codified in the Twelve Tables. Ausonius (Idyll xi. 61) describes the contents of the latter as 'ius triplex':

'Sacrum, privatum, populi commune quod usquam est.'

But even if we admit the substantial accuracy of the attempts which have been made to reconstruct the Tables in outline it is not easy to distinguish these three elements with any precision.

There appears to be no doubt that the first three Tables dealt with civil procedure, from summons down to execution of judgment. According to a recent authority on the subject,[1] the fourth regulated inheritance, both testamentary and intestate, and patria potestas: the fifth various titles to property, servitude, and contract: the fifth and sixth related to divorce and the two varieties of guardianship: the seventh to delict and usury: the eighth to a variety of topics, including the relations of adjoining proprietors and certain criminal matters: the ninth continued the latter subject, and prescribed the procedure on criminal prosecutions: the tenth regulated interment; while the last two made provision for appeals from the action of the magistrates, and contained other subordinate enactments. The scantiness of the law relating to contract is noteworthy.

Legal antiquaries on the Continent who have accepted as substantially true the myth which ascribes the origin of Rome to the union of three tribes belonging to different ethnic stocks, two of which are by them identified as Pelasgic and Sabine,[2] have spent much ingenuity in attempting to detect the original diversity of the elements contributed to the common stock of jurisprudence by the two dominant tribes, and to trace the gradual process by which these were blended into a homogeneous system of law. They speak of the element peculiar to the Ramnes, as opposed to that peculiar to the Quirites; the genius of the former people lay in the direction of conquest and activity in external relations, that of the latter in the promotion of domestic order and peaceful internal development; and the genius of each is supposed to have reflected and reproduced itself in their legal habits and in their modes of life and thought. Such speculations assuredly cannot claim our serious attention; but a question which is suggested by them is of larger interest, because the answer to it will affect our judgment upon the general character of the legal system through a great part of its history, and will determine our explanation of many of its most peculiar phenomena. It is the view of many who have deeply studied the institutions of Rome that, in its infancy, the consciousness of the people as a military state, which had perpetually to be defending its very existence with the sword, asserted itself so irresistibly as to colour the law of Rome to the very end of its history. In periods of grave national peril citizens always realise most fully their membership one with another,

[1] M. Voigt, Die xii Tafeln, 1883.

[2] Puchta, Institutionen, i. p. 73.

and are most ready to sacrifice the fleeting interest of the individual to the higher and more engrossing requirements of the state. Hence is inferred a fact which (as it is represented) left its mark upon Roman law even in the age of Justinian, twelve hundred years after the epoch which we are now considering; the fact, namely, that in the earliest period of the nation's history almost every relation with which jurisprudence has ever had any concern was dominated by public law, or by the idea, expressing itself in law, that beside, or apart from, the state, the citizen is as nothing, and that he has no ground for complaint if his family life, his religion, his dealings with his fellow-men, his very liberty and life are treated principally as means to the end of government, and placed under state control. The position of the family in the state economy has been already indicated. The very existence of the people, as an organic whole, depended on the maintenance of the gentes through families; and as a new family could arise only from the lawful wedlock of two citizens, marriage was made a public act and placed under sacerdotal supervision; the solemn rite of confarreatio (Gaius i. 112), by which alone it could be contracted, was a ceremony of deep public and religious import. Again, through lack of children, or through the death of such as might be born, a family might be in danger of dissolution; hence the supreme political importance of the institution led to the recognition of adoption as an artificial means of perpetuating its existence; and adoption, too, was a public act, accomplished under the auspices of the priestly college before the comitia curiata.

There is perhaps less probability in the alleged extension to the field of property of this domination of public over private law. The old principle of law, it is said, laid it down that conquered land and captured booty belonged, primarily, to the state, and that it was through the state alone that it could become the property of individuals. Thus according to the view now under consideration, no citizen originally owned an inch of Roman soil; he could only possess and enjoy it by permission of the populus, and it remained 'ager publicus' until the settlement of large numbers of strangers on Roman territory had brought into prominence the legal distinction between civis and peregrinus, a distinction which then became emphasised by the former being held capable, the latter incapable, of owning land ex iure Quiritium. But to maintain the principle that all res mobiles belonged, ultimately, to the state, was less easy. On one explanation, however, of a famous distinction of Roman law —that of 'res mancipi' and 'res nec mancipi'—the traces of that

principle were retained until the distinction itself was swept away by Justinian. It is suggested that the idea that all 'res mobiles' belong ultimately to the state survived only in connection with certain subjects of property—things, in other words, which usually form the staple of military booty, and of which individuals were thus most likely to have got possession by concession from the state. This idea, it is maintained, led to the introduction of a peculiar mode of alienation for these kinds of objects, namely, mancipatio, in which the sanction of the populus to the transaction was supplied by the presence of a definite number of witnesses who were full citizens of Rome (Gaius i. 119).[1] But whatever may be the truth as to the distinction of res mancipi and res nec mancipi, we know that for many centuries a slave could not be effectually enfranchised

[1] This is but one of many views as to the origin of the distinction. Sir Henry Maine (Ancient Law, p. 275) says: 'The explanation which appears to cover the greatest number of instances is, that the objects of enjoyment honoured above the rest were the forms of property known first and earliest to each particular community, and dignified therefore emphatically with the designation of *Property*. On the other hand, the articles not enumerated among the favoured objects seem to have been placed on a lower standing, because the knowledge of their value was posterior to the epoch at which the catalogue of superior property was settled. They were at first unknown, rare, limited in their uses, or else regarded as mere appendages to the privileged objects. Thus, though the Roman res mancipi included a number of moveable articles of great value, still the most costly jewels were never allowed to take rank as res mancipi, because they were unknown to the early Romans.' Ihering thinks that the res mancipi were those objects of property essential to the maintenance of the joint family life: 'ohne beides (i.e. free persons and res mancipi) lässt es sich ein ordentliches Hauswesen, eine gesunde Wirthschaft gar nicht denken' (Geist des römischen Rechts, ii. p. 165). Other explanations are based on the actual market value (Kostbarkeit) of the objects (Cujacius, Bynkershoek), or on the supposition that a special return of res mancipi was required in the census (Puffendorf, Göttling). The last theory is in substance adopted and ably argued by Prof. Muirhead (Roman Law, pp. 57–64), who attributes the distinction to Servius Tullius, the founder of the census: res mancipi meant 'a man's land and its appurtenances': and 'in order to ensure as far as possible certainty of title, and to relieve the officials of troublesome investigations of the genuineness of every alleged change of ownership between two valuations, it was declared that no transfer would be recognised which had not been effected publicly, with observance of certain solemnities, or else by surrender in court before the supreme magistrate (in iure cessio).' The majority of recent authorities seem however to agree that the distinction is based upon a still older one between Familia and Pecunia, the former denoting family, the latter, private property. Upon this see in particular Cuq, Institutions juridiques des Romains, i. pp. 91–100. Voigt (Röm. Rechtsgeschichte, i. pp. 437 sq.) holds that the distinction of things into mancipi and nec mancipi, under those names, is no older than about B.C. 150, and was established by a constitutio iurisperitorum (*constituebatur* quasdam res mancipi esse, quasdam non mancipi, Gaius ii. 16).

except by a public act; that the earliest forms of wills were dispositions sanctioned either by direct legislative authority of the populus or by its representatives, the five witnesses of the mancipation; and that the earliest mode in which a binding contract could be concluded was almost certainly the so-called nexum, which in all essential features was identical with mancipation. Thus the authority of the populus—the sanction of public law—was required to validate almost every dealing between man and man, whether it was a marriage, a sale, a contract, the manumission of a slave, the emancipation of a son, or a testamentary disposition.

The prominent influence of the plebeian element of the state in the development of private law has been already alluded to as a fact which by itself appears beyond question. The theory now under discussion has the merit of explaining this fact, and of carrying the history of the evolution of private law even further backwards. Suits in which religious considerations or a religious sanction were involved were submitted for decision to the pontifices, presided over by the king as pontifex maximus; and it is represented that religion occupied so large a sphere in the life of early Rome that the whole of the original law may be regarded as partly ius publicum, partly ius sacrum. What was subsequently known as 'ius privatum' attained a gradual recognition and advanced by timid steps to independence under the protecting aegis of ius sacrum; 'ius sacrum was the form which private law at first assumed, and in which it first received an independent though subordinate existence, as against the absorbing and preponderating weight of ius publicum.' But the plebs, when it became an integral part of the Roman state, was free from all prejudices based on the history of the populus; and 'it was in the plebs that the ius Quiritium, the private portion of the code, received its full development, and from the plebs that Rome got an idea which perhaps otherwise she would never have got—the idea of a private person.' The relations of a private person must be governed by private law, and thus it is to the plebeian element in the state that the main institutions of private law are to be ascribed. Some of these developments—the new forms of marriage and of adoption—have been already suggested. But the plebs consisted of persons who were no part of the populus; exactly then as the members of the latter (who had now come to be called patricians) could only possess and enjoy land, but not own it, so the members of the former, precisely because they were not of the populus, could only, if they were to hold land at all, hold it in absolute private ownership,

ex iure Quiritium. And thus, it is argued, private ownership of land originated with the plebeians, and was extended to the populus from a feeling that the latter ought in no way to be inferior to a population which politically lay so far below it. Similarly, emancipation, as a form of escape from patria potestas, manumission of slaves and the resulting patronatus, nexum, and manus iniectio, are all supposed to have been institutions due to the plebeian development of private law.

This view, however, of the relation of public and private law in early Rome, attractive though it is, and though very widely accepted, has not passed without challenge. By its chief opponent [1] the earliest character of the Roman law is explained by reference to another principle, that of the 'subjective will', or mere brute force and individual strength, uncontrolled by any state organization whatever. 'Might is right' is the first principle by which disputes between man and man are determined. This social condition is followed by a period in which self-redress is no longer arbitrary, but is regulated by minute rules sanctioned by custom; [2] and eventually the stage of legal history is reached which is so vividly represented to us in the 'legis actio sacramenti', disputes being referred at first to the arbitration of a 'vir pietate gravis', though a private individual, and subsequently to that of an official of the state. The question thus arises, What then is the origin of the state? This is found in the family organization, and in the association of a number of families connected by real or fictitious relationship for the purpose of common defence, and forming an aggregate known to us as the gens: 'die Gens ist eine Familie im Grossen, und ein Staat im Kleinen.' The individual thus precedes the family, the family the gens, and the gens the state; and from the point of view of the 'subjective principle' the state is based upon a contract or quasi contract, whence the connection of the terms pax, pactum, pacisci.

To those who hold this view, private law appears, in origin, entirely independent of the state. 'The plausibility of the theory (first stated) is due to the public forms in which private law at first is clothed, and to the absence of opposition between the different parts of the system. It is, however, just those forms which prove that the state, in itself, had nothing to do with private law; for their

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[1] Ihering, Geist des römischen Rechts, part i. bk. i. §§ 9–19: 'die Ausgangspunkte oder die Urelemente des römischen Rechts.'

[2] Maine, Early History of Institutions, p. 273.

very purpose is to place the two in a relation to one another which previously did not exist; and that absence of opposition consists, not in the domination of private law by the state, but of the state by private law: that is to say, the state is constructed on private law principles. The evolution of private law out of the state would be a contradiction of all history.' [1] Nor is the force of this argument in any way weakened by the admitted fact that the principal dispositions known to early Roman law were effected under state supervision (p. 18, supr.). The object of this was to obtain a public guarantee for the rights which they conferred: a citizen who disputed such rights would be resisting the authority of the whole people. And it is conceivable that the idea of law backed by irresistible force, with which Austin has made us familiar, and which is peculiar to societies in which the judicature is and has long been organized on an effective system, was developed out of this expedient of defending individual rights, through the medium of a form, by the collective force of the whole community: 'das Concrete war hier wie so oft in der Geschichte des römischen Rechts die Brücke zum Abstracten; aus dem Schutz der Rechte entwickelte sich der Schutz des Rechts.'

Like so many other irresponsible rulers, the 'decemviri legibus scribundis' were corrupted by the taste of power which they had enjoyed; so much did they relish it that they attempted to make their own office permanent, and to revolutionise the form of government by substituting themselves entirely for the consuls and tribunes. Pretending to make an 'exaequatio iuris' the main object of their policy, they set to work to attain it by reactionary measures; but the plebs, whose interests were mainly threatened, saw through the design, and resorted once again to the well-tried stratagem of a secession. The fall of the decemviri marks an important epoch in the history of that order. It would seem that the concilia plebis, whose frequent convocation we have seen to have been a principal consequence of the institution of the tribunate, had so rapidly gained weight that by a lex Publilia of B. C. 471 their legality was recognised, along with the constitutional right of the tribunes to submit resolutions for discussion therein, though it was not yet admitted that such resolutions, when carried, were of binding force for the people at large. The voting in such concilia was 'tributim'—according to the Servian division into districts or parishes. The possession of legislative authority by their resolutions—plebis scita—

[1] Ihering, p. 219.

is attributed by Roman historians to three distinct laws [1] of the comitia centuriata, which, according to their statements, were practically identical in tenor. The earliest of these is the lex Valeria-Horatia, B. C. 449, which is supposed [2] to have enacted 'ut quod populus tributim scivisset, populum, quod plebs tributim scivisset, plebem teneret': it thus not only gave force to the enactments of the comitia tributa [3] (in which the whole populus voted tributim), but provided that the resolutions of the plebs, voting in the same manner, should bind the plebeians. But the preliminary sanction of the senate was necessary, before they could have even this amount of authority: and perhaps the real effect of the lex Publilia, passed B. C. 339 at the instance of Q. Publilius Philo, a plebeian dictator, was to make plebiscita binding on plebeians without the necessity of this senatorial approval. The statute, however, which Gaius and Justinian both regard as having placed the validity of plebiscita above all doubt was a lex Hortensia, enacted B. C. 287. The language in which Pliny and Gellius describe its provisions differs little from that used of the leges Valeria-Horatia and Publilia by Livy: but it is clear that it must have relieved plebiscita from some conditions to which they had still been subject, and it is generally supposed that, as the plebs and the patricians were no longer hostile forces, it enacted that, if they were sanctioned by the senate, they should bind the whole people, patricians and plebeians alike.[4]

The measures by which the coveted 'exaequatio iuris' was finally attained require a brief review. The lex Canuleia (B. C. 445) legitimated connubium between patricians and plebeians, and by uniting the members of the two orders by the tie of blood rapidly paved the way for the other enactments which at length welded them into a united people, with identical interests, and equal one with another in the eye of the law. Two years later was introduced the office of censor, which immediately became of large political importance. The duty of making out the lists of citizens in their various classes of

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[1] Lex Valeria-Horatia, Livy, iii. 55; Dionys. xi. 45; lex Publilia, Livy, viii. 12; lex Hortensia, Pliny, Hist. Nat. xvi. 10: Gellius xv. 27; Gaius i. 3; Justinian Inst. i. 2. 4.

[2] Karlowa, Römische Rechtsgeschichte, i. p. 120.

[3] Their technical denomination seems to have been populi scita: Frontinus, de aquaeduct., c. 129; Valerius Probus, litt. sing. 3. 1.

[4] Mommsen, Römische Forschungen I², pp. 208 sq., refers to a passage of Appian, bell. civ. i. 59, which speaks of Sulla's ordinance that no tribune should lay any legislative proposal before the plebs until it had been approved by the senate as the restoration of an old rule which had long become disused.

course involved a very considerable power of affecting the individual in his political rights ; thus, for instance, the censors were privileged to exclude a man from the senate, to deprive an eques of his horse and rank, or to remove a plebeian from his tribe, on account of defects not only of legal qualification but even of moral character ; while as moribus praefecti they could lower his position in the eye of his fellow-citizens by the subscriptio censoria, or mark set against his name in their official list—the sure indication of dishonesty or profligacy. Among the other functions through which they gained their political influence may be enumerated the administration of the public revenues, the farming of the customs, and the making of all contracts for public works.

At the time of the passing of the lex Canuleia, the plebeians had striven hard to gain access to the consulship, but their efforts had been baffled by the patricians, who, however, conceded that a new magistracy should be established, 'tribuni militum consulari potestate,' to relieve the consuls of some of their duties, and to this new office members of the plebs were to be eligible. At first it seems to have been frequently held by plebeians, but by degrees the patricians succeeded in making it almost as exclusively their own as the consulship had ever been, and Livy represents (vi. 37) a tribune of the plebs as saying in the year B. C. 369 that no plebeian had attained this magistracy for forty-four years. Seven years before that date C. Licinius Stolo had renewed the plebeian agitation for admission to the consulship, and in B. C. 367 he succeeded in procuring a statute by which the military tribuneship was abolished, and it was provided that one at least of the consuls should be chosen from the plebs. The same date is usually assigned to the introduction of the praetorship, an office which seems really to have been in existence for some time previously, and of which more will be said hereafter. The praetor was charged with the administration of civil justice and the general management of domestic affairs, so far as they had not been already appropriated to existing offices. The institution of the curule aedileship belongs to the same period, an office at first exclusively patrician, but soon thrown open to the plebeians also ; the aedile's functions, which at first related only to certain affairs peculiar to the patrician order, such as the games of the great festivals, were very shortly extended to all matters, whether connected with the public health, religion, morality, streets, buildings, or security of person and property, so far as they could be placed under the control of police.

Besides the lex Licinia by which the consulship was opened to the plebs, there are two others of the same name, which were due to the energy of the same Licinius Stolo. Of these one was designed to relieve embarrassed debtors by striking off from the amount of their principal debts the sums which they had paid as interest, and by allowing them an interval for the complete satisfaction of their creditors; the other was a land law in favour of small holdings, which prohibited even the richest from owning more than five hundred jugera of arable land, or putting more than one hundred head of cattle and five hundred sheep to graze upon the public pastures. Before long, too, an adequate senatorial representation of the plebs was secured by the lex Ovinia (circ. 350 B. C.), which directed the censors, in the selection of the senate, to choose the fittest persons without distinction of order: '... donec Ovinia intervenit, qua sanctum est ut censores ex omni ordine optimum quemque curiatim (iurati, Meier, ex coniectura) in senatum legerent' (Festus). Magistrates of curule rank (consuls, praetors, and aediles) were members of the senate *ex officio*, and retained their seats even at the end of their year of office, until the next revision of that body by the censors, when their re-election depended on the view which those magistrates took of their merits.

The numbers of the plebs were largely augmented B. C. 312, when Appius Caecus, the censor, distributed among the tribes a great mass of libertini, a term which at this epoch denoted the freeborn descendants of a manumitted slave.[1] These libertini were thus enrolled in the centuries, and possessed very considerable influence through the wealth which they derived from their almost exclusive control of Roman handicrafts and commerce, occupations which were deemed humiliating and derogatory to genuine Quirites; in Rome they played the part, and exercised the influence, though in a far less degree, which with us are associated with 'the city'. Eight years later than the censorship of Appius Caecus, the democratic tendency of his measure was to some degree counteracted by the new censors, Q. Fabius and P. Decius, who confined the 'forensis turba' of libertini to the four city tribes, and thus reduced the preponderance which the lower orders had acquired in the two important comitia. A second lex Publilia enacted 'ut legum quae comitiis centuriatis ferrentur ante initum suffragium patres auctores fierent': it thus at first sight merely reaffirmed the constitutional doctrine, that no bill

[1] Suetonius, Claudius, 24.

should be submitted to the centuries, with a view to its becoming law, unless it had been previously approved by the senate ; but it is generally supposed to have deprived the patricians of the power, which they seem to have exercised before, of rejecting laws properly passed by refusing a subsequent ratification by the senate. In future the senatorial approval was required to be given in all cases before the bill was referred to the popular vote. It is clear from Cicero that in his time the Servian centurial constitution had undergone considerable alterations, effected by in some way combining the centurial organization with that of the tribes. The two comitia, with their respective functions, still remained perfectly distinct, but the centuries had been incorporated with the tribes ; Cicero (pro Planc. 20) expressly speaks of them as thus incorporated, and in another passage alludes to the votes of the tribes in his own election as consul. The exact date of this change is uncertain. Niebuhr ascribes it to the censors Fabius and Decius ; Mommsen places it somewhat earlier. Its motive was apparently the desire to reduce the influence of moderate fortunes in the comitia, and to exalt that of birth, landed property, and military rank. The proprietary qualification for even the first of the Servian classes had, through the growing prosperity of Rome, ceased to be the measure of a considerable fortune or even the index of social respectability ; thus a great mass of the lower middle class had found its way into a body which Servius had conceived as consisting of only the higher or richer orders. The same observation may be made of the second and succeeding classes ; the social position of the members of this or that class had altered along with the change in the value of money, and the relative rank in the state of those who composed class one, and who, as we have seen, formed a political force of overwhelming influence, had fallen in proportion ; the timocratic constitution remained the same, while money had come to be worth less ; the result being a complete change in the political centre of gravity. The natural remedy seemed to be to give up, at any rate partially, the timocratic system, to diminish the number of the centuries, whereby the influence of the equestrian order would be increased, and to bring them into a subordinate relation with the tribes, in whose assembly the political preponderance lay rather with the landed proprietors. These at least appear to be the general lines of the reforming policy. Though the exact changes are more or less matter of conjecture, the best theory of them seems to be that, while the old equestrian centuries, eighteen in number, were left

untouched, those of the five Servian classes were distributed among the tribes and at the same time reduced in number, there being fifty-four centuries in the rusticae, eight in the urbanae tribus ; so that the whole number of centuries would now be eighty. The classes still voted in their old order, but speaking generally, were, so far as related to the comitia, no longer determined by a property qualification. The right of a citizen to vote in the comitia centuriata depended on his being enrolled in a tribe, and to what tribe he belonged was settled by the censors. By the year B. C. 241, the number of tribes had by successive additions been raised to thirty-five.

As might have been inferred from its history, the plebs in its legislative capacity concerned itself mainly with matters of private law, the great majority of enactments which relate to this subject being plebiscita ; the leading business of the comitia centuriata was the election of magistrates and deliberation on high political matters. After the latter assembly had acquired its full powers, the oldest gathering of all, the comitia curiata, dropped back into a position of quite secondary importance, and its right of independent legislation was less and less frequently exercised. The functions which it continued to discharge were the approval of such resolutions of the centuries as by inveterate custom required a religious sanction, and of other legal dispositions which were deemed incomplete unless confirmed in this manner. The action of the curiae is in fact implicated with that of the pontifices, to whom was first submitted any business for which it was desired to obtain the legislative sanction of this comitia ; for instance, the form of adoption known as adrogation, and the lex curiata de imperio, by which the higher magistrates, with the exception of the censors, were invested with their authority, both have a religious significance. It is not known how long the patricians continued to attend the meetings in person ; long before Cicero's time they were merely represented by thirty lictors.

The senate apparently did not exercise any purely legislative authority, at any rate in respect of private law, till the last century B. C. Besides its important function of discussing all matters before they were submitted to the assembly of the centuries, which indeed could not be so submitted at all without a senatorial resolution 'ut de ea re ad populum ferretur', it exercised a considerable influence in this period over the elections. Originally it nominated the candidates whose names the consul was to lay before the comitia ; when

the plebeians became eligible to all the higher magistracies, this right fell into desuetude, and free canvassing became the rule. But the senate was still able to make its weight felt through the magistrate who conducted the elections ; and by the necessity of its ' auctoritas ' it controlled the comitia curiata, whose approval of the choice made by the centuries was given, as has just been observed, by the lex curiata de imperio. Even of this influence the senate was indirectly deprived by a lex Maenia, by which it was enacted that the senatorial auctoritas to the comitia curiata should be given before instead of after the assembly of the centuries in which the magistrates were elected.

The period between the reform of the comitia centuriata and the fall of the Republic produced few constitutional changes which left their mark on private law or on the form of direct legislation. The gradual extension of the Roman dominion over Italy, and then even beyond its confines into Gaul and Spain, Greece, Asia, and Africa, resulted in a constant increase in the value of the Roman civitas, and in a perpetual struggle for the acquisition of it and the privileges which it conveyed on the part of the Italian allies of the city. Their rebellion ninety years before Christ, and the legislation (leges Iulia and Plautia Papiria) by which they became full citizens of Rome, are too well known to need repetition ; but the political weight which numerically they deserved was denied them by their not being fairly distributed among the thirty-five existing tribes, but probably among eight of them only. The establishment, however, by Rome of colonies at various points in her dominions had led to a distinction of civil rights which subsequently became of some prominence, and which therefore requires a brief notice. The earliest colonies of this kind consisted of Roman citizens, who retained their full rights of civitas even in their new home. Contrasted with them are what are called ' coloniae Latinae ', by which we should understand Roman colonies whose members enjoyed only the ius Latii or Latinitas. These coloniae Latinae were of two kinds, those which originated, like the old Roman colonies, in the actual ' deductio ' or leading of a number of citizens to a new residence amid a conquered population, which was thereby to be awed into submission, and those which existed as townships before, but received the character of Latin colonies, without change in their inhabitants, by statutory enactment. The ius Latii comprised certain of the rights enjoyed by a full Roman citizen, and some of them which were not possessed by the municipia and praefecturae in various parts of Italy upon

which Rome had conferred a limited civitas. The inhabitants of a municipium or praefectura had, before the leges Iulia and Plautia Papiria, no political rights (suffragium and honores), nor in all probability had they the connubium ; but they had the commercium, and consequently could hold property and make contracts and wills exactly like full Roman citizens. The chief advantage of Latinitas over the limited civitas of a municeps was that if a citizen of a Latin colony served therein the office of a superior magistrate he thereby acquired the full citizenship of Rome (Gaius i. 96) ; other modes were subsequently introduced in which 'Latins' could become perfect Quirites, and this capacity of rising to the Roman citizenship is the distinctive feature of the ius Latii as a legal status. After that, by the leges Iulia and Plautia Papiria, the Italian allies had been incorporated with the Roman people, the limited rights denoted by Latinitas were retained as a kind of reward which could be bestowed on cities or districts outside Italy which had deserved well of Rome, but on which she hesitated to confer the civitas ; it was thus quite clear what was meant by a 'Latin' ; it was no longer an ethnical or geographical, but a legal term, and by Latinitas or ius Latii was understood a limited citizenship, which in certain ways might be converted into full citizenship of Rome. The lex Iunia Norbana (see note on i. 5. 3) enacted that slaves who had received their liberty in some other way than by one of the three civil modes of manumission (vindicta, census, testamentum), and who had hitherto remained legally slaves, though protected in the enjoyment of liberty by the praetor, should possess this ius Latii, whence they were called Latini Iuniani ; but the lex expressly prohibited them from making a will (Ulp. reg. 20. 14 ; Gaius i. 22 sqq.).[1]

The character of the substantive law in the period intervening between the final constitution of the state and the fall of the Republic is a subject important because it involves a discussion of the origin and nature of the praetor's indirect power of legislation, and of the

[1] Thus in the time of the classical jurists there were two kinds of Latins : (1) the Latinitas of the Latini coloniarii, which was still to be found in some cities on which the ius Latii had been conferred, and which contained the commercium without any limitation ; (2) Latinitas acquired by manumission, in consequence of the lex Iunia Norbana, of which there were four varieties : (*a*) slaves informally manumitted, (*b*) slaves manumitted under the age of thirty years without observance of the provisions of the lex Aelia Sentia (Gaius i. 18–21), (*c*) slaves manumitted by a 'bonitary' owner, or by a true owner, while they were the subjects of a usufruct or pledge, (*d*) the descendants of libertini whose Latinitas had been due immediately to manumission.

kindred distinction between ius civile and ius gentium. Ius civile is one of the two contrasted terms in two celebrated oppositions of Roman law, between which there is an intimate relation. It is opposed, firstly, to ius gentium or naturale in general, and in this connection it is said (Dig. 41. 1. 1. pr.) to be 'ius proprium civitatis nostrae'; so too private law is described (Inst. i. 1. 4) as tripertitum, 'collectum est enim ex naturalibus praeceptis, aut gentium, aut civilibus.' Secondly, it is opposed to the praetorian law which was based on and drawn from the ius gentium: 'ius civile est, quod ex legibus, plebiscitis, senatus consultis, decretis Principum, auctoritate prudentium venit: ius praetorium est, quod Praetores introduxerunt adiuvandi, vel supplendi, vel corrigendi iuris civilis gratia' (Dig. 1. 1. 7).[1] The proper meaning of ius civile is thus the peculiar indigenous law of Rome, as contrasted either with the whole ius gentium, or with such part of the latter as was taken up by the praetor into his edict. Its sources are enumerated in a passage already cited, as 'leges, plebiscita, senatus consulta, decreta principum, auctoritas prudentium.' Only the first two of these are of practical importance until the establishment of the empire, but all are explained below or in the Commentary on Book I. Title 2. Cicero (Top. 5) adds to these sources of the civil law three others, viz. res iudicatae, mos (cf. Inst. i. 2. 9), and aequitas. Usage, as a source of positive law, will be treated in the passage of the Institutes referred to.[2] The authority of precedents, expressly recognised by a rescript of Severus, was established, as we may gather from Cicero, at a far earlier period. 'Nam imperator noster Severus rescripsit, consuetudinem aut rerum perpetuo similiter iudicatarum auctoritatem vim legis obtinere debere' (Callistratus in Dig. 1. 3. 38). By res iudicatae in Roman law are to be understood those rules of customary law which gained acceptance by the uniformity of their

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[1] Certain deviations from this most common use of the first of the contrasted expressions may be noticed. (1) In some passages ius civile signifies the older civil law, whatever its specific source, as contrasted with later enactments which either (*a*) partook of the nature of ius gentium (thus in Gaius ii. 197, 8, it is opposed to the SC. Neronianum), or (*b*) were based on political rather than on purely legal considerations (thus in Gaius ii. 206, and Ulp. reg. 24. 12. 13 it is opposed to the lex Papia Poppaea). (2) It is sometimes opposed to the criminal law (e.g. Cicero in Verrem, i. 42, pro Caecina 2). (3) In Dig. 1. 2. 2. 5 and 12 it is used to denote the law made by the Roman jurists, 'quod sine scripto in sola prudentium interpretatione consistit.' (4) It sometimes expresses the ius Quiritium as summed up in the Twelve Tables.

[2] Cf. Holland, Jurisprudence, pp. 50–56.

judicial application to individual cases, and which, according to Austin, are the only true customary law whatsoever; among them the most important were the praeiudicia of the centumviral court. Their importance, however, as a source of law is so trifling that neither Gaius nor Justinian mentions them;[1] and this is one of the most interesting points of difference between the English and the Roman system, which Sir Henry Maine explains by the difference in their early history: 'The theoretical descent of Roman jurisprudence from a code, the theoretical ascription of English law to immemorial unwritten tradition, were the chief reasons why the development of their system differed from the development of ours.' By 'aequitas' Cicero seems to have meant the internal, living, intellectual principle which is an element in all law, and consequently not a distinct source from which a particular kind of positive law is generated; his use of the term is popular rather than scientific. Not far different from this is the sense which it bears in certain passages of the Digest (e.g. 47. 4. 1. 1; 16. 3. 31. 1) as equivalent to 'ratio', the correspondence between a legal rule or institution and the spirit of civil or natural law. In other passages aequitas denotes (*a*) the agreement between rules of positive law and the natural sense of right (e.g. naturalis aequitas, Dig. 2. 14. 1 pr.; 37. 5. 1 pr.), (*b*) the decision of a legal question with special reference to the circumstances of the case (Dig. 44. 4 pr.), or (*c*) equity in the modern sense, i.e. mitigation of strict law in accordance with a higher sense of justice (e.g. Dig. 1. 3. 25; 4. 1. 7 pr.; 15. 1. 32. pr.).

The ius praetorium, which, as we have already seen, was contrasted by the Roman lawyers with the ius civile, though equally with it a part of the positive law of Rome, originated in the ius edicendi possessed by the higher magistrates. The distinction between magistratus maiores and minores was connected with the right to take the auspices; auspicia maxima might be taken only by consuls and praetors, on whom 'iustum imperium auspiciumque domi et militiae' were conferred by a lex curiata. The imperium carried with it also the ius decernendi; a magistrate invested with imperium had the right of issuing a decretum, of summoning a citizen (vocatio) to appear before him by his lictors, of enforcing obedience to his orders by the strong arm of the law. Some of the magistratus minores, e.g. the tribuni plebis, had the ius prensionis, the right of arresting persons present before them and keeping them in

[1] See Clark's Practical Jurisprudence, pp. 216–218.

detention ; others had neither vocatio nor prensio. The praetor, however, who, as has been remarked, was the supreme judicial magistrate, and who by means of his ius edicendi was enabled to gradually develop a system of law in which the ius civile was eventually swallowed up, had little opportunity of modifying existing law, still less of introducing new rules, in the earliest period of his activity. This incapacity arose from the system of procedure (legis actiones) sanctioned by the Twelve Tables and somewhat expanded by later legislation ; the forms of actions were rigidly prescribed by statute, and the magistrate had no power to directly alter or extend them ; from the forms of actions only could a citizen deduce the rights which were guaranteed him by the civil law. The only mode in which the praetor could enforce a legal principle not contained in that law was by an exercise of his imperium ; he could, for instance, grant on application a missio in possessionem, whereby the applicant was empowered to temporarily seize some property of another person with a view to compelling him to do some required act ; or he could compel a party to enter into a wager (sponsio) with his adversary, and the fact upon which the wager turned could then be decided in a legis actio. This, for instance, was the origin of the possessory interdicts, and thus of the whole law of possession as distinct from ownership. But the praetor's real power to introduce new legal principles dates from the lex Aebutia [1] which (Gaius iv. 30) practically superseded the legis actiones in the majority of cases by a new form of procedure, by which the praetor was enabled to grant actions (actiones honorariae) not based on the civil law. He did this at first mainly by the employment of fictions ; in the formula in which he indicated to the iudex the issue to be tried he referred to some rule of law already established, by analogy with which the present case was to be decided (Gaius iv. 32-38). Subsequently, becoming bolder, he habitually granted actions on grounds of which there was not even a shadowy recognition in the civil law, and the whole formula consequently contained no reference to rules or principles which the law had established.

As has been already observed, the form in which praetorian changes were made in the law was the edict. The higher magistrates of Rome had always possessed the ius edicendi, the right of issuing

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[1] The date of the lex Aebutia lies between B.C. 149 and 126. For the evidence see Girard, Mélanges de droit Romain, i. pp. 67–174.

to the people public and imperative notices on matters which fell within their jurisdiction or formed part of their official business. The censors issued edicts relating to a coming census; the consuls in this way summoned the senate and the comitia, and Plautus speaks of edictiones aediliciae regulating the public markets. The praetor, as invested with the supreme civil jurisdiction, would naturally find the most frequent occasion for publishing such edicts, and it became usual for him, at the commencement of his year of office, to proclaim in this manner the principles which, apart from the established rules of the ius civile, he intended to observe in the administration of justice. Such proclamation was no small security for the impartial treatment of all suitors, and saved the citizen from the hardships of ex post facto legislation; it thus became a constitutional obligation of every praetor, on taking office, to state the general rules by which, as chief judicial magistrate, he should guide himself during the year. This edict, which he issued at the commencement of his administration, was called edictum perpetuum, because the practice was constant and unbroken, and was contrasted with edicta repentina, isolated orders made by the praetor during and not at the commencement of his year of office, and generally, though not always, relating to some specific case. The distinction between edictum perpetuum and edictum repentinum is thus not identical with Austin's distinction between law and particular command, for edicta repentina not uncommonly enounced a rule or principle of law; for instance, the edict which the praetor Atilius (B. C. 213) directed against the encroachments of strange religions, though a 'law', was yet an edictum repentinum. It also became usual for each successive praetor to adopt, in substance, the edict of his predecessor, with such additions, abrogations, and changes as he deemed expedient. Such part of his edict as a praetor derived from that of his predecessor in office was called edictum tralaticium. It was owing to this fact that, though the edict of each individual praetor had such an ephemeral validity, the praetorian law was at once so stable and yet so elastic. By the constant accretion of new rules which legal development and increasing commercial activity required, the edict assumed the form of a permanent body of law, which had the advantage of the ius civile in the ease with which it could be repealed, altered, or extended, and which, therefore, apart from other considerations, recommended itself as a mode of legislation in many ways preferable to that of the comitia. It must indeed be remembered that, technically, the praetor had no actual legislative

power. But no judge could hear an action save by his authority: he could grant an action where none lay before: by the introduction of exceptiones he admitted defences previously unrecognised, and by his system of possessory interdicts he created proprietary interests entirely strange to the civil law. It would be difficult to find a better illustration of the extent to which one having the control of the courts, and of the forms of civil procedure, can react on the substantive law.

The danger of entrusting to the caprice of a single individual so large a power of altering the law will strike every reader; but it had two very efficient safeguards. One of these was a strong public and professional opinion: the other was the short duration of the praetor's office. If one praetor ventured on innovations which were not approved by the people or the lawyer class, his successor could easily remove his obnoxious additions from the edict; for a year they would be binding, but beyond that they had not necessarily any validity. In point of fact, it would seem that each praetor framed his edict after careful consultation with his friends learned in the law, and that changes were but rarely introduced for which public opinion was not ready; the fact, already noticed, that each praetor always accepted a very large portion of the edict of his predecessor, a portion, indeed, which every year grew comparatively larger, as every year made the edict more complete, proves that the Roman praetors, as a class, were the best of conservatives. Cicero accuses Verres of having issued 'edicta nova in re vetere', and altered rules for which the constant acceptance of his predecessors had won the confidence and affection of the people; but we may believe that Verres had few imitators, and that, as a general rule, both parts of the edictum perpetuum—the part which was old and the part which was new—were alike viewed with approval by the mass of the people. Though, however, few were guilty of Verres' breach of faith, who, according to Cicero (in Verr. i. 46), in his judicial administration sometimes followed a course the very opposite of that which in his edict he had deliberately stated he intended to take, it seems that in the last century of the Republic it became very usual for the praetor to vary the rules stated in his edictum perpetuum by subsidiary edicts issued during his year of office. This violation of constitutional usage menaced the stability of the law, and accordingly was made illegal by a lex Cornelia (B. C. 67), 'aliam deinde legem Cornelius, etsi nemo repugnare ausus est, multis tamen invitis, tulit, ut praetores ex edictis suis perpetuis ius dicerent. Quae res cunctam gratiam

ambitiosis praetoribus, qui varie ius dicere solebant, sustulit' (Asconius ad Cic. orat. pro Cornelio, cf. Dion Cassius, xxxvi. 23).

The reference to Verres seems to make this a convenient place to describe how the number of praetors was increased, and to point out the bearing of this on the development of Roman law. As will be shortly seen, the large number of foreigners who established themselves at Rome for commercial purposes led (B.C. 247) to the appointment of a second praetor, called the praetor peregrinus, who administered justice at Rome as between foreigners or foreigners and citizens. This praetor also issued an edictum perpetuum consisting, as will be shown, of rules derived from what was known as the ius gentium, a general law applicable to the Romans and to all people, which became binding for Romans *inter se* by being imported steadily, though gradually, from the edict of the praetor peregrinus into that of the praetor urbanus. The former edict may thus be regarded as an almost inexhaustible reservoir whence the praetor urbanus drew those streams of ius naturale by which the civil law of Rome was expanded and liberalised. When the territories of the state were extended beyond the limits of Italy new praetors were made. Thus, two were created, B.C. 227, for the administration of Sicily and Sardinia, and two more were added when the Spanish provinces were formed, B.C. 197. Sulla increased the number from six to eight, which Julius Caesar raised successively to ten, twelve, fourteen, and sixteen. Many of these, and also the consuls after their year of office, were entrusted with the government of a province; usually for a year, though the time was often prolonged. Such governors, whether proconsuls or propraetors, were invested with imperium and jurisdiction within the limits of their respective provinces, and presided there as completely over the administration of civil justice as did the praetor urbanus at Rome. Accordingly, provincial governors naturally adopted the practice of issuing, at the commencement of their term of office, an edictum stating the rules and principles which they should observe in the exercise of their jurisdiction. Hence arose a number of edicta provincialia, which we should have supposed consisted partly of rules of the ius gentium, partly of the indigenous law of the provincial population; though, on the analogy of the edict of the praetor urbanus, the latter would have been excluded. Mr. Long [1] says, however, that they were founded on

[1] Smith's Dictionary of Greek and Roman Antiquities, article 'Edictum'; from which much of this information respecting the provincial edict has been obtained.

the edictum urbanum, though they likewise comprehended rules applicable only to the administration of justice in the provinces. They are often mentioned by Cicero, who says (e.g. in his letters to Atticus, vi. 1) that he promulgated in his province two edicta, one provinciale, which, among other matters, contained everything that related to the publicani, and another, to which he gives no name, relating to matters of which he says ' ex edicto et postulari et fieri solent'. As to all the rest he made no edict, but declared that he would frame all his decreta on the edicta urbana. The provincial edicts may thus perhaps be regarded as in some way serving the purposes which, for the generalisations of modern social science, are attained by collections of statistics in various parts of the world. The edict of the praetor peregrinus was a collection of legal rules which were found to be observed in common by all the peoples with whom Rome was acquainted ; and the formulation of such rules would be facilitated, and their number largely increased, by a comparison of the various provincial edicts. The institution of the provinces, and, with them, of the edictum provinciale, must have given a great impulse to the development of the edict of the praetor peregrinus ; through the medium of the latter they were brought into relation with the edictum urbanum. We do not know whether the work of Ofilius, referred to by Pomponius in Dig. 1. 2. 2, was an attempt to collect and arrange the various edicta ; but we shall see that when the edict was systematised by Salvius Julianus, in the reign of Hadrian, it is possible that the provincial legislation was similarly dealt with (p. 50 inf.).

The activity of the praetor urbanus in this mode of indirect legislation was due, to a very large extent, to the lex Aebutia, which had indirectly cast upon him the task of devising and elaborating a new code of procedure, and thereby enormously increased his power of altering and extending the substantive law. But it was also due in no small degree to the exclusiveness of the Roman legal system, and to the consequent necessity of discovering some rules, other than the rules of the ius civile, by which the commercial relations between Romans and peregrini should be governed. In some cases these were settled by treaty,[1] by which it was agreed that legal disputes

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[1] The oldest example of such a treaty is that concluded between Rome and Latium, B.C. 493, which provided that actions on contract between Romans and Latins should be decided, after ten days' interval, in the locus contractus, by recuperatores appointed by the local magistrate. The term was connected with reciperatio, the treaty : 'reciperatio est, ut ait Gallus Aelius, cum inter populum

between members of the respective states should be decided by a special tribunal, the judges of which were called recuperatores, though they seem always to have been citizens of the state in which the court lay.[1] So far the arrangement was satisfactory, and in many respects more complete than might have been expected in so rude an age; the difficulty was as to the law which the recuperatores were to apply. This could not, ex vi termini, be the ius civile; and we may suppose that the trading peregrini partly adapted themselves to Roman legal habits, partly introduced a conventional code based on their own mercantile usages, and that the recuperatores decided each case as it came before them on evidence of the terms upon which the contract was concluded, and with reference to the generally accepted commercial custom. The trade of Rome, however, expanded so much with her conquests, and the dealings between citizens and allies of Rome on the one hand, and peregrini on the other, increased so largely in number and importance, that, if only to relieve the praetor urbanus of the duty of appointing recuperatores upon so many occasions, it was found necessary to establish a praetor peregrinus in the mode already described: 'Post aliquot deinde annos, non sufficiente eo Praetore, quod multa turba etiam peregrinorum in civitatem venirent, creatus est et alius Praetor, qui peregrinus appellatus est ab eo, quod plerumque inter peregrinos ius dicebat' (Pomponius in Dig. 1. 2. 2. 28). In addition to cases which had to be tried by recuperatores, the new praetor thus dealt with suits to which both parties were peregrini, and for the hearing and decision of which apparently no machinery had existed at Rome. The procedure which he applied was probably of the same nature as that which, somewhat later, the praetor urbanus adopted after the enactment of the lex Aebutia. Gaius tells us that the action rested on his imperium as distinct from statutory form (iv. 103 sqq.), and we may suppose that he first heard the allegations of the parties, and then fixed the issue to be tried in written instructions, which were delivered to the recuperatores or to the single iudex whom he appointed, and to whom the decision of the case was committed.

The law which, under the superintendence of the praetor peregrinus,

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et reges nationesque et civitates peregrinas lex convenit, quomodo per reciperatores reddantur res reciperenturque, resque privatas inter se persequantur' (Festus). See Mr. J.L. Strachan-Davidson's Problems of the Roman Criminal Law, I, pp. 211 sqq.

[1] Many writers (e.g. Huschke and Rudorff) maintain that the recuperatores were a mixed court composed of citizens of both states. Keller (Civil Prozess, p. 31) is unable to come to any conclusion, but Bethmann-Hollweg (Civil Prozess, § 25) denies that there is any evidence in favour of their view.

these judges administered, was of course, in origin, the same which the recuperatores had always applied in the decision of actions which were brought before them. But it now assumed a more consistent and permanent character by being embodied in the new praetor's edict. Its steady growth was thus assured, no less than through the activity of leading citizens themselves, who became connected with foreign towns or districts in the Roman dominions by the tie of patron and client, and who, in this relation, took a lively interest in the development of this new branch of law. The mode in which the praetor peregrinus gradually elaborated a tolerably complete body of rules by which actions between citizens and foreigners, or foreigners only, should be decided, has been variously represented. Sir Henry Maine (Ancient Law, p. 48 sq.) seems to adopt the view of those who hold that he compared the usages of the various Italian nations with whom Rome was acquainted, and by this conscious and deliberate process collected a system of principles which the majority of peregrini engaged in commerce on Roman territory with citizens or with one another would recognise as binding: 'naturalia iura quae apud omnes gentes peraeque servantur' (Inst. i. 2. 11). But this seems an instance of the common error of ascribing scientific habits to a prescientific period, and the eclectic process implies a mental constitution which was not common among the Romans. It is true that this view is not unsupported by some dicta of the Roman jurists themselves; but these, we must remember, wrote at a time when the treatment of law had passed from the empirical to the scientific stage, and their evidence is therefore the less trustworthy. It would seem more probable that this body of law originated in a practical necessity,[1] which, though slight at first, became gradually more and more pressing, and that it grew with that necessity, its development being accidental and due to circumstances, though effected under the fostering care of the praetor peregrinus; rather than that it sprang into existence, so to speak, uno ictu, as the result of a conscious comparison of Italian usages. This body of law, however, whatever may have been its precise origin, was what the Romans knew as the ius gentium; a collection of rules, embodied in the edict of the praetor peregrinus, for the regulation of commercial transactions of peregrini at Rome, either *inter se*, or with the citizens and allies of the Roman state. In its original signification it is the law which Rome applied in favour

[1] So too Mr. Long, Cicero's Orations, vol. i. p. 168.

of the 'gentes', the non-Roman peoples, whose members sought justice at the hands of Roman magistrates ; a law not binding any people in particular, but supposed to bind all people in general, in their private dealings with one another. As such, it had no validity for Roman citizens *inter se* ; their rights and obligations were determined, in relation to one another, by the ius civile : 'Nam quod quisque populus ipse sibi ius constituit, id ipsius civitatis proprium est, vocaturque ius civile, quasi ius proprium ipsius civitatis' (Gaius i. 1, Inst. i. 2. 1) : and we have already seen that the ius civile was a law based on the religion and customs of the race, which we may perhaps believe was at first considered far higher and more precious than the ius gentium or any other law whatsoever, and which accordingly the Romans persistently refused to extend to anyone who was not himself a citizen.

There can be little doubt that in the course of time a very great change came over the feelings with which the Romans, and especially the lawyer class, regarded the law of all nations in contrast with their own indigenous law. Sir Henry Maine (Ancient Law, p. 52 sq.) has fixed the date of this change as contemporaneous with the conquest of Greece, and the importation of the Stoic philosophy to Rome. He has described the revolution which ensued upon the wide acceptance of that philosophy in the West, and more particularly from the ardour with which the lawyer class threw themselves into its study. He has shown how its leading principle was life according to the law which nature had once, in a far-off age, laid down for the governance of human relations, when states, and therefore civil law, had not begun to exist, and which had become lost and forgotten in the artificial society of nations which prided themselves on their civilisation ; how the Roman lawyers leapt to the conclusion that the ius gentium, with its universal validity, was no less than this lost code of nature, and how, as was only consistent, they transferred to it all the affection and veneration which hitherto they had bestowed on their own narrow and exclusive municipal law. Attractive as this theory is, it is submitted that it cannot be received without some qualification. Greece became a Roman province in the middle of the second century before Christ : but her philosophies were as yet regarded at Rome with dislike and suspicion, and in B.C. 161 their teachers had been expelled from the city. Stoicism was first raised to full influence in the higher ranks of Roman society by means of the group which gathered round Scipio Aemilianus, who died B.C. 129 ; and Quintus Scaevola, consul B.C. 95, and the

founder of scientific jurisprudence, was one of its earliest eminent disciples. We may believe that from the last-mentioned date onward its doctrines were applied to the development of law with consistency and success ; but it still remains to be proved that the Romans did not begin to regard the ius gentium with feelings other than of disdain until this period. The edict of the praetor peregrinus had been in existence, and applied to citizens in their relations with foreigners, for more than a century and a half, and edicta provincialia had been issued for considerably more than a century ; and we cannot believe, on the one hand, that the praetor urbanus could have witnessed the continuous growth of this liberal and reasonable system of law without having adopted portions of it in his own edict during the second century B.C., while, on the other, it is impossible that this could have been done without the approval of the profession and of the nation. Stoicism then, it would seem, cannot be credited with having been the original and entire cause of the change in the feelings with which the Romans regarded the ius gentium.[1] On the other hand, it is probably true that, after the time of Scaevola, the improvements in the law, in respect not only of internal development, but also of scientific treatment, were due in a very large degree to the alliance between the lawyers and the Stoa. The identification of the ius gentium with the law of nature was not universally admitted till the age of the classical jurists, among whom we find one so eminent even as Ulpian attempting to distinguish them.[2] But

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[1] A friendly reviewer of the first edition of this work in the 'Times' of Sept. 8, 1883, criticised this page as an unintentional misrepresentation of Sir H. Maine, but on a careful reperusal of the third chapter of 'Ancient Law' the writer can see no reason for changing his statement of the author's view. The following citations may be useful. 'This crisis (at which the Romans altered their attitude towards the ius gentium) arrived when the Greek theory of a Law of Nature was applied to the practical Roman administration of the law common to all nations' (p. 52). 'It is notorious that this proposition—live according to nature—was the sum of the tenets of the famous Stoic philosophy. Now on the subjugation of Greece that philosophy made instantaneous progress in Roman society' (p. 54). 'In the front of the disciples of the new Greek school, we might be sure, even if we did not know it historically, that the Roman lawyers figured. . . . The alliance of the lawyers with the Stoic philosophy lasted through many centuries' (p. 55).

[2] The position of ius naturale in the legal system, as compared with ius gentium, is not precisely determined in the passages of the Corpus Iuris which relate to it. Sometimes, and indeed most frequently, they are used as synonymous (e.g. Inst. ii. 1. 11, where they are identified) ; and where this is so, the expression ius naturale refers to its assumed origin, and to the accord of certain legal principles with the needs and requirements of the reasonable nature of man. It is this 'naturalis

we cannot overestimate the effect which the Stoic philosophy had upon legal method. Scaevola, the first great lawyer of the School, was also the first Roman who wrote a systematic legal treatise; and it is to the habits of thought which the profession acquired with its tenets that we should ascribe not only the systematic classification, the mapping out of the field of private law bequeathed to us by Gaius, but also the wealth of Roman law in legal principles, and the admirable logic of their subordination and interconnection.[1]

It was in some such way as this that the Romans came to recognise in the ius naturale or ius gentium a universal law binding on themselves, and to say of it, as Cicero does (de Offic. iii. 17), 'quod civile non idem continuo gentium, quod autem gentium, idem civile (i. e. civium) esse debet'. Notwithstanding, however, the fact that the ius gentium was constantly being absorbed into the system through the edict of the praetor urbanus, the ius civile still retained its peculiarities; the streams of the two did not intermingle, so that the contrast between civil and praetorian law from this time onward becomes emphasised. The result was very similar to that which ensued upon the incorporation of the plebs in the Roman state, namely, a duplication of institutions. Whether it be in the domain of the family, of property, or of obligations, the legal institutions of Rome are henceforward found to a large degree in duplicate, institutions of the ius gentium existing side by side with institutions of the ius civile. The thoroughness of this is perhaps best attested by the prominence, in all departments of the code, of the opposition between 'the natural' and 'the civil'. Thus, the conditions of marriage depend upon either civilis or naturalis ratio (Inst. i. 10 pr.): there is a natural as distinct from a civil relationship, and the history of the law of intestate succession is merely the history of the substitution of the former title for the latter by equity, as represented first by the

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ratio' which furnishes the raw material of the ius naturale, and from which the latter derives its universal validity; as reason is man's 'differentia', ius naturale must be valid wherever man is to be found, and therefore is coextensive with ius gentium. Sometimes, however, a narrower signification is given to ius naturale, and it is used to indicate the aggregate of those institutions of Roman Law which were deemed to be based not so much on the intellectual as on the moral side of human nature, or to a certain extent on an instinct shared with man by the lower animals. This is the sense which the expression bears in Inst. i. 2 pr. (on which see note), where it is distinguished from ius gentium, and in Ulpian in Dig. 1. 1. 1. 4 'ius gentium est quo gentes humanae utuntur. Quod a naturali recedere, facile intelligere licet, quia illud omnibus animalibus, illud solis hominibus inter se commune sit'. But in other passages of the Institutes, as has been observed, the two are identified.

[1] See Zeller's Stoics, Epicureans, and Sceptics, ch. iv.

praetor, and later by the imperial legislation ; there are both natural and civil modes of acquisition in the two fields of ownership and obligation ; there is natural as well as civil possession, natural as well as civil obligation.

In many cases the rules of the edict differed in form only from those of the civil law ; in substance they were the same. But the vast majority of them are distinct in kind as well as in form ; they have none of the peculiarities of the civil law—formality, exclusiveness, rigidity ; they are liberal, equitable, fitted to endure through all time ; and these are based upon the ius gentium, or rather upon the natural sense of right, the naturalis aequitas, in which the Romans recognised that law's internal and generative principle. The ius gentium and the ius honorarium or praetorium (for practical purposes the expressions are nearly synonymous) thus require to be distinguished, and their relation to one another ascertained. The distinction of ius civile and ius honorarium is based on the difference of the organs to whose activity they respectively owed their existence; that of ius civile and ius gentium on differences of nature and of extension. The two would have corresponded exactly if the whole ius gentium had been taken up into the urban edict, and the latter had contained no other law whatsoever ; but as a matter of fact, though there is a very intimate relation between them, rules could and did belong to the one without also belonging to the other. Still, the most important portion of the rules enunciated in the edict can be traced to the ius gentium, which indeed was the element in it which gave it such an honourable prominence among the sources of the positive law of Rome. Hence the common opposition, to which attention has been already drawn, between the ius praetorium and the ius civile. Yet not unfrequently the former is reckoned part of the latter, or rather the edicta magistratuum are enumerated among its sources (e. g. Cic. Top. 5), though it is far more usual to find them contrasted (as in Dig. 28. 1. 23 'testamentum utroque iure valebit, tam civili quam praetorio'). The contrast was in part a material one ; the civil law was 'proprium civitatis nostrae', whereas the greater part of the ius praetorium was derived from the ius gentium, and therefore its validity extended itself beyond the limits of the Roman state into all nations which were under the rule of law. But in part, as has been remarked above, it arose from the difference of the organs through which the civil and the praetorian law respectively came into existence. A rule of the ius praetorium had no validity other than that which could be given it by the

praetor by whom it was issued ; it did not bind his successors or even his official colleagues ; its force was far less, both in duration and in universality, than that of a lex enacted by the sovereign populus. Rights conferred in the latter way were necessarily protected by the praetor at all times, but they existed apart from and independently of him ; rights conferred by the edict depended purely and simply on his good faith ; thus (Dig. 7. 4. 1) ' usus fructus iure constitutus ' is opposed to ' usus fructus tuitione praetoris constitutus ' ; and it was through this formally ephemeral character of the ius praetorium that the ius civile always preserved its distinctness and its separate existence.

The connection which we have sketched between the ius gentium and the edicts of the praetors, though maintained by perhaps the majority of writers on Roman law, is entirely a matter of inference, and there are distinguished authorities by whom it is entirely denied. That there was a special praetor to adjudicate upon causes in which either party was an alien is too well proved by the evidence of Pomponius, Gaius, and others, to need further demonstration, and that he had an edict distinct from that of the praetor urbanus, though disputed by some writers,[1] is clearly stated by Gaius himself (i. 6). The existence of the second edict is convincing evidence that the law administered in suits between aliens, or between aliens and citizens, was fundamentally different from that administered by the praetor urbanus : and in believing this there should be no difficulty, for we know that aliens were never permitted to take part in the forms and dispositions of the civil law,[2] such as sponsio, legis actio, testamentum, mancipatio, expensilatio, and in B. C. 247 the Roman law relating to nearly all matters upon which litigation was likely to arise before the praetor peregrinus was purely ' civil '. Upon any other hypothesis than that which has been adopted it is extremely difficult, if not impossible, to understand how the notion of a ius gentium exercised such an extraordinary influence upon the Roman legal mind : it would seem to have been a living reality, always present in actual manifestation before their eyes. Perhaps a solution of the difficulty of deciding between the two conflicting theories[3] will

[1] E. g. Clark, Practical Jurisprudence, p. 349.

[2] Cicero, Top. 2.

[3] Voigt and Karlowa may be taken as respectively their most eminent modern exponents. The learning and research of the former make his opinion on this matter, to which he has devoted years of study, particularly valuable. He is followed, among more recent writers, by Sohm, Institutionen, 2nd edition (1886), p. 48 (pp. 53, 54, in the English translation by J. C. Ledlie).

be found in the belief that the expression 'ius gentium' somewhat changed its meaning between the earlier and the later period of Roman legal history. By the earlier Romans it was doubtless conceived as an historical fact: as a body of rules (e.g. those relating to most of the modes of acquisition subsequently known as 'natural', and to some of the more common subjects of contract) actually recognised not only in the law of Rome itself, but also in that of the surrounding Italian tribes, and possibly among even more distant peoples.[1] The stage in which other rules and practices attributed to the ius gentium are applied by the praetor peregrinus in determining suits between aliens, but without having become part and parcel of the law of Rome, is an intermediate one; but when the ius gentium came to be identified with the ius naturale, it became a philosophical ideal, a system in the clouds, with no historical basis, but—as an ideal—infinitely valuable.

An influence upon the growth of the law which, being for the most part unperceived is apt to be overlooked, is that of what (for want of a better phrase) may be called the legal profession. The necessity of some authority to interpret the law, when it has been reduced to a written statutory form, is observed by Pomponius in Dig. 1. 2. 2. 5. This interpretation passed through three phases, which have been aptly termed the esoteric phase, in which the law was in a sense kept secret, being the monopoly of a small religious caste: a phase of secularisation, in which the knowledge of it becomes diffused, and lay lawyers succeed to the functions of the priests: and a phase of systematisation, in which we first meet with regular legal treatises, whose authors attempt to express the body of legal rules in some sort of organised form and arrangement.

The disposition to keep the law secret, in the period immediately following the Twelve Tables, is attested by Pomponius, who says

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[1] See an article on the subject by Prof. H. Nettleship in the Journal of Philology, xxvi. pp. 169–182. After a careful review of all the passages in which the expression occurs, in non-legal as well as in legal writers, he comes to the conclusion that ius gentium meant 'the usage of the world, of all mankind, and that it was in all probability first employed as a quasi-technical expression by the lawyers of the second century B.C., Cicero's maiores (de Off. ii. 69). They originally intended to express by it such customs or usages as the Romans found, in the experience which they would pick up away from Italy in war or commerce or travel, or in their intercourse with peregrini in Italy itself, to be universally observed. These usages would naturally be connected in the main with war or commerce, and thus ius gentium, when the term is applied to the dealings of Romans with foreigners, is used mostly of the laws of war and of transactions involved in a state of war, or of commerce or transactions connected with it, such as obligationes of various kinds'.

of those who knew it before Tiberius Coruncanius 'in latenti ius civile retinere cogitabant, solumque consultatoribus vacare potius quam discere volentibus se praestabant' (Dig. 1. 2. 2. 35). Similarly Livy (9. 46. 5) speaks of 'ius civile reconditum in penetralibus pontificum', and Cicero (de Orat. 1. 41. 186) says 'veteres illi, qui huic scientiae profuerunt, obtinendae atque augendae potentiae suae causa pervulgari artem suam noluerunt'. Knowing what we do of the publication of the Twelve Tables, and of the openness with which legal proceedings were conducted, we are tempted to regard these statements either as untrue, or as gross exaggerations. But their real meaning is that though the law, in its abstract form, was knowable to all, its application and inner meaning had passed into the hands of a profession, without whose aid the layman could make no use of it, and which built up a body of esoteric subsidiary rules of procedure and interpretation by reason of which knowledge of the law by itself became unpractical and almost useless.[1] This process or development is termed by Pomponius 'interpretatio' or 'disputatio fori', and its result is described by him specifically as 'ius civile'. Hence the same author's statement (Dig. 1. 2. 2. 6) that the knowledge of the enacted laws, the science of their interpretation, and the course of procedure, were for more than a hundred years after the decemviral legislation in the hands of the pontifices, one of whom was appointed in each year with the special concern of legal matters between citizen and citizen (qui praeesset privatis), though his exact function in this connection is obscure.[2]

Of this monopoly of the pontifical college the early implication of sacral with secular rules (fas and ius) is, in itself, a sufficient explanation. Among its more general consequences are the formalism of legal acts and dispositions, the excessive literalness of interpretation applied to enactments, the insistence on determinateness in the objects of transactions, and the application to matters of law of the sharply drawn distinctions which had their origin in matters of religion. More specifically we may note that many legal topics and questions are still dominated by religious influences and considerations, such

[1] Un homme du peuple romain eût été, a-t-on écrit, aussi embarrassé pour appliquer les XII Tables à une situation donnée qu'un homme du peuple d'aujourd'hui pour se servir d'une table de logarithmes. (Girard, 4th ed. p. 44.)

[2] According to Ihering (Geist, i. p. 298), he tried all actions in which the procedure was by sacramentum: while another view is that Pomponius meant only to signify the preponderant situation which he occupied, in the administration of justice, as the interpreter of the law (Cuq, Institutions juridiques, p. 148).

as marriage, divorce, wills, adrogations, inheritances (especially in respect of the sacra charged upon them), sacrorum detestatio, votum, tutela, pignoris capio, distinctions of property, and the calendar and its connection with litigation. Moreover, it is to the ingenuity of the pontifical lawyers that we must attribute one of the most striking features of legal development, the frequent employment of existing forms, methods, and institutions for the attainment of novel objects which would otherwise have been unattainable ; for instance, the collusive use of the forms of an action at law to artificially create patria potestas, and to facilitate alienation and manumission : the construction of clauses in the Twelve Tables, by which, among other things, emancipation was made possible ; and the application of mancipation so as to increase the powers of testamentary disposition, and to obviate some of the inconvenient incidents of the lifelong dependence of women. And finally it is to be observed that by reason of the relatively small number of patrician families from whose members the pontifical college was recruited, and the consequent handing down from father to son of practice, usage, and tradition, continuity was secured in the interpretation and practical application of the legal rules existing.

Among the causes which brought this esoteric phase of interpretation to a close, and led to the transfer of law from religious to secular influences, was the creation of the praetorship. Whatever sense may be attached to Pomponius' statement respecting the superintendence of matters of private law by one of the pontifical college, it is clear that the secularisation of legal practice followed closely and rapidly upon the establishment of this office. About B.C. 304 a compilation containing the legis actiones, and made by Appius Claudius Caecus, was stolen from him and published by Cn. Flavius, the son of one of his freedmen (ius Flavianum), whereby 'ius civile per multa saecula inter sacra caerimoniasque deorum immortalium solisque pontificibus notum vulgavit' (Val. Max. 2. 52). Pomponius tells us (Dig. 1. 2. 2. 7) that the service which Flavius thus rendered to the people was rewarded by his election as a tribune of the plebs, as curule aedile, and by his promotion to the senate. Shortly afterwards, Flavius also affixed publicly in the forum the calendar of court days, thus enabling anyone to learn on what days he could bring a legis actio without the necessity of consulting the pontiffs, while Sextus Aelius published the so-called ius Aelianum, the forms of some supplementary methods of procedure not comprised in the Flavian compilation : and in B.C. 300 the lex Ogulnia increased the pontifical college by

four members, who were to be plebeians, hitherto ineligible. It is significant that one of the earliest plebeian pontifices was also elected praetor. Fifty years later Tiberius Coruncanius, the first plebeian who attained to the dignity of pontifex maximus, 'publice profiteri coepit,' which may mean that he advised clients before listeners, who thus had the opportunity of taking notes of his opinions and learning the law in its practical application, or that he admitted persons of all classes as his pupils, instead of the patricians alone, to whom such instruction had hitherto been confined. In these various ways knowledge of law slowly ceased to be a priestly monopoly, and became open to laymen: and one of the most notable consequences of these changes was undoubtedly the enactment of the lex Aebutia.

The characteristic of the last of the three phases of republican juristic influence is the conscious effort to state the law in a systematic form. It commences with Q. Mucius Scaevola, consul B.C. 95, whose work, in eighteen books, on the ius civile was the first [1] methodical treatise on the subject of which we have any knowledge, and is frequently quoted and commented on by the legal writers of the empire. Servius Sulpicius, consul B.C. 51, was the author of the first commentary on the Praetor's Edict, and had for pupils most of the lawyers who became famous towards the end of the Republic, such as Alfenus Varus, Aulus Ofilius, C. Trebatius Testa, and Q. Aelius Tubero. Another celebrated jurist, who made a name less as a writer than as a praetor of original and progressive ideas, was Aquilius Gallus. But the work of men such as these was not merely literary. Cicero, who may doubtless be presumed to reflect current ideas on the business of a lawyer with accuracy, says (de Orat. i. 48) 'sin autem quaereretur quisnam iurisconsultus vere nominaretur, eum dicerem qui legum et consuetudinis eius qua privati in civitate uterentur, et ad respondendum, et ad agendum, et ad cavendum, peritus esset'. 'Respondere' denotes the giving of opinions on cases or points submitted to the lawyer by clients, and sometimes even by judges: for it must be remembered that even till a much later date the Roman iudex was merely a layman appointed to try and decide a particular case: and although, as in England, the point at issue was perhaps more often one of fact than of law, still it would often

[1] Earlier written works were not of a systematic character. Among them are the Tripertita of Sextus Aelius Paetus, consul B.C. 198, the third part of which is probably the same as the so-called ius Aelianum: the 'commentarii' of the two Catos, and the 'monumenta' of C. Livius Drusus, consul B.C. 147.

happen that intricate and difficult questions of law arose upon a trial, in which the iudex found it necessary to ask a professional lawyer to advise him, or even to act as an assessor.[1] By 'agere' is meant the class of business which we associate rather with a solicitor than with a counsel—the taking of the formal steps required for the bringing or the defending of an action—while 'cavere' denotes the preparation of technical legal documents.[2] Each of these three functions is a variety of juristic interpretation, as understood by the Romans themselves, although the first alone is so directly. The product of these various activities was a body of rules of a theoretical nature, which by the very soundness of their reasoning exercised a powerful influence on magistrates and judges; and we may feel assured that many legal changes and improvements which are directly attributed to the Edict were really due to the weight of a united professional opinion, ascertained and solidified by the 'disputatio fori' of which Pomponius speaks.

The political changes which took place in the years immediately succeeding the death of Julius Caesar are not unfrequently misunderstood. It has been usual to speak of 'the establishment of the empire', and thence to infer that the form of constitution was revolutionised, and an open despotism suddenly substituted for the free Republic with which the Romans had now for centuries been familiar. The real fact is that formally the constitution remained republican under and even long after Augustus; the only outward change has been not inappropriately described as the addition to the old magistracies of a new one, which was held for life, and whose holder was invested with an authority far larger, because more compact, than that of all the old magistrates together. On Augustus was conferred, sometimes for life, sometimes for shorter periods, but always to be renewed, the tribunicia potestas, the proconsulare imperium, the praefectura morum, the supreme pontificate, and in fact all the highest offices of state: but in each of these capacities he acted merely as a magistrate of the Republic, whose outward forms he was studious to observe. Hence, according to the theory of the constitution, the supreme power continued to reside in the populus Romanus, and was exercised, as before, in the two comitia for

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[1] Cicero, de Fin. ii 19.

[2] In pro Murena ix. 19 Cicero adds 'scribere' to the three above-mentioned functions of a properly equipped lawyer. Krüger (Geschichte des röm. Rechts, p. 50) conjectures that this means merely the giving of *written* advice to clients and judges. Karlowa (Rechtsgeschichte, i. p. 477) takes a different view.

elective and legislative purposes. Augustus himself voted amongst the tribes like any other citizen, and the theoretical sovereignty of the people remained intact until the accession of Constantine.

The legislation of the early empire accordingly proceeded at first in the same manner as it had been accustomed. Leges are still enacted in the comitia, though usually introduced by the emperor in person, and if by some other magistrate, always with his sanction; for his tribunicia potestas enabled him to veto any project which did not meet with his approval. Gaius, who belongs to the middle of the second century, speaks of this form of enactment as still potentially subsisting: 'lex est, quod populus iubet atque constituit' (i. 3). But in fact comitial legislation had received its death blow from the extension of the franchise to the Italians some sixty years before the battle of Actium made Augustus the sole ruler of Rome: and though we read [1] of an agrarian law passed under Nerva (A.D. 96–98), it may be doubted whether this was a lex rogata, and it is more probable that statutes enacted by the whole populus came to an end half a century earlier. The legislative authority of the senate endured longer. This had originated partly in its old probouleutic functions, partly in its relation to the administration. In connection with the latter, it would seem that even under the Republic its rights had practically been admitted of regulating the government of the provinces, maintaining religion, suspending or repealing laws in cases of urgent public necessity, guarding the privileges of the aerarium and the publicani, and superintending the treatment of the Italians and provincials; upon all of which matters it was in the habit of making consulta to which it required general obedience. Its legislation was thus at first confined to public matters; the earliest senatus consultum which we know is that de Bacchanalibus (B.C. 186) discovered on bronze in Calabria in 1640. It had also made use of its influence over the magistrates by suggesting to them reforms in law or procedure which they could carry out by an exercise of their imperium. But the party of the optimates had regarded the senate as the fundamental element of the state, of co-ordinate authority with the populus, and had therefore maintained that its resolutions ought in all cases to have equal validity with leges; thus Cicero enumerates senatus consulta among the sources of ius civile, and says of the senate (de Leg. iii. 3. 12) 'eius decreta rata sunto'. The claim was constantly resisted by the populares, though supported

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[1] Dig. 47. 21. 3. 1.

by usage ; nevertheless the senatorial legislation by degrees extended itself to matters of private law, though but little of it relating to this is found in the pre-imperial period. That senatus consulta under the early empire gradually superseded leges is attributed by Justinian after Pomponius (Dig. 1. 2. 2) to the extension of the suffrage, and the consequent unwieldiness of the comitia : 'Nam cum auctus esset populus Romanus in eum modum ut difficile esset in unum eum convocari legis sanciendae causa, aequum visum est senatum vice populi consuli' (Inst. i. 2. 5). Under Augustus, and still more under his successors, it became so usual to ascribe the force of law to senatus consulta without sending them on to the comitia, that at length they actually acquired the title of leges (e. g. Gaius i. 83–86) ; similarly, the name comitia was commonly given to the sittings of the senate (Tacitus, Ann. i. 15, Capitol. Marc. 10). The transference of legislative authority from populus to senate is indicated by the practice of naming senatus consulta, like leges, after their proposers ; but this was not invariable : for instance, the SC. Macedonianum seems from Dig. 14. 6. 1 to have received its title from an unscrupulous usurer called Macedo, though Theophilus says that Macedo was the borrower. Most of the senatus consulta relating to private law fall between Claudius (A. D. 41) and Septimius Severus (A. D. 193–211); none occur after the last-named emperor. Like leges in this period, they always owed their introduction to the imperial will, though usually proposed by a consul ; in effect, they were laws made by the emperor, though under observance of republican forms.

The emperor, however, possessed the right of making laws directly, without reference to either senate or comitia. This right had not belonged to Augustus and his immediate successors ; as magistrates of the Republic they could issue edicts, which had a greater validity than those of the old annual magistrates, because they held office for life : but in theory their force died with them. Thus, Dion Cassius (lvi. 28) mentions a lex of A. D. 12, by which it was provided that resolutions arrived at by Augustus with the advice of his council should have the force of a senatus consultum. The authority which Augustus possessed in virtue of his various offices was conferred on his successors by separate leges ; later, the emperor was invested with his powers uno ictu, by a lex de imperio, after the analogy of the lex curiata of the early legal period, which also gave his enactments the force of statutes (Gaius i. 5) and released him from the control of the laws (Dion Cassius, liii. 18. 28). This lex de imperio is in Inst. i. 2. 6 and other passages of the Corpus Iuris called lex regia, but

it was probably never so entitled before the third century, when to avoid the comparison between rex and imperator would have been mere affectation. An important fragment of the lex de imperio of Vespasian (A. D. 69) is extant; it empowers the emperor to conclude alliances, procure senatus consulta, nominate the magistrates, extend the pomoerium, and issue enactments with the force of law. And so absolute did the imperial authority become in the next 150 years, that Ulpian could, early in the third century, speak of a complete devolution of the power of the people to the emperor: 'Cum lege, quae de imperio eius lata est, populus ei et in eum omne suum imperium et potestatem conferat' (Dig. 1. 4. 1 pr.). The general term used to denote law made either directly or indirectly by the emperor is constitutiones; their various kinds are described in a note to Bk. i. 2. 6. After Septimius Severus, in whose reign, as has been observed, the last of the senatus consulta was enacted, the whole legislative authority of the state concentrated itself in the hands of the emperor. Up to the time of Constantine, however, the emperors legislated with reference to specific cases of litigation, by decreta and rescripta, rather than by direct and merely prospective enactment; and such changes as were thus made in the law were far less comprehensive than those made by leges and senatus consulta. The period in which direct imperial legislation was most active had yet to come.

The distinction between the ius civile and the ius praetorium in no way ceased with the introduction of the empire, but rather became emphasised. Even had the office of praetor been suppressed, and the edictum perpetuum ceased to appear, the development of the praetorian law, in its peculiar character as a liberal and equitable system, could hardly under the circumstances have been arrested: in particular we know that a fresh impulse was given to the growth of the praetorian law of succession by the lex Papia Poppaea in the time of Augustus. But, as a matter of fact, the two praetors at Rome, and the governors in the provinces, continued to issue their annual edicts under not only Augustus but also his successors, and the ius gentium was still, as before, being constantly worked into the legal system, and alterations and additions being made in that large part of the urban edict which had now been handed down from praetor to praetor for generations. These additions and alterations, however, were largely occasioned by contemporaneous legislation (e.g. the leges Falcidia, Iulia et Papia, and various senatus consulta); for we may venture to suppose that, when the comitia passed no statutes which were not originated by the emperor, a magistrate

would have hesitated to repeal or alter or extend the law with the independence which had been usual under the free Republic. The powers of the praetors were also encroached upon by the new imperial officials, such as the praefecti annonae et urbi; who in their administrative capacity developed a practice of deciding many disputes in person, extra ordinem, which otherwise would have been heard by a iudex in the ordinary manner.

From the time of Hadrian (A.D. 117-138) the formal separation which has been noticed between the respective edicts of successive praetors ceased to exist. That emperor divided the whole of Italy into Rome, with its immediately surrounding territory, and four other districts; Rome and its suburbs remained under the authority of the old magistrates, and among them of the praetor, while the other districts were placed under the administration of a new class of officials, called at first consulares, and after M. Aurelius (A.D. 161–180) iuridici. With this change was in all probability connected a still more sweeping reform effected by Hadrian. The perpetual edict had by this time seemingly become unexpansive and stereotyped, and it was deemed desirable to finally determine its contents, and its relation to the legislative authority of the emperor. Accordingly between the years 125–128 A.D.[1] Hadrian instructed the famous lawyer Salvius Julianus to revise and systematise in a compact form the edict of the praetor urbanus and possibly that of the praetor peregrinus, incorporating also certain portions of the aedilician edict relating to market law, or providing for the preservation of the public order and safety in streets and open spaces: the resulting work was ratified by an imperial senatusconsult, and there seems to be some ground for supposing that a general provincial edict was issued at the same time, to be observed uniformly by the governors of the provinces throughout the empire.[2] That the edict of Julianus —known henceforth as edictum perpetuum *par excellence*—was still regarded as 'ius honorarium' by the lawyers of later generations makes it probable that it continued to be formally promulgated each year, and derived its validity from the magistrate's imperium: but whether this was so or not, the magistrate had no power to change

[1] For the evidence of the date see Girard, Mélanges de droit Romain, i. pp. 214–248.

[2] This is denied by Mommsen. But what else could have been the subject of Gaius' work of 32 books ad edictum provinciale? The edict of 'his own' province, which Mommsen imagines to have been the topic, could hardly have deserved so extensive a treatment. See Roby, Introduction to Justinian's Digest, p. clxxviii.

any of its provisions, and Hadrian himself evidently directed that any defect which might subsequently be discovered in the law should be supplied by imperial legislation : ' et hoc non primum a nobis dictum est, sed ab antiqua descendit prosapia, quum et ipse Iulianus, legum et edicti perpetui subtilissimus conditor, in suis libris hoc retulit, ut, si quid imperfectum inveniatur, ab imperiali sanctione hoc repleatur ; et non ipse solus, sed et divus Hadrianus, in compositione edicti et senatus consulto, quod eam secutum est, hoc apertissime definivit, ut si quid in edicto positum non inveniatur, hoc ad eius regulas eiusque coniecturas et imitationes possit nova instruere auctoritas' (Justinian in Const. 'tanta' de Confirm. Digest. § 18).[1]

The mention of the responsa prudentium among the sources of the ius civile makes it necessary to speak of the work done by the class of professional lawyers in the development of Roman law under the Empire ; and as it was to these men that that law was indebted for such scientific forms of expression and classification as it possessed, as well as for many of its other special merits, it will not be amiss to consider this subject with some fullness. The names of the early 'prudentes' who lived under the Republic are collected by Pomponius in Dig. 1. 2. 2. 35–39, and some account has already been given of the nature of their influence on the law, and of the scope of their professional activities. This, as will be seen, was considerably extended on the fall of the Republic. Savigny has remarked [2] that the art of public speaking, which in the time of freedom had been the first among the arts of peace, had, with the disappearance of freedom, lost all power and influence. Yet from the earliest time the Romans had devoted themselves more to law than to any other branch of public life, and it was accordingly in the study of law that the highest and noblest intellects now engaged, and in which they found the completest satisfaction of such aspirations as were still tolerated by the Empire.[3] With them we first get the idea of a scientific knowledge of the principles of law, or jurisprudence, a science which was entirely of their creation. Its favourable and symmetrical growth under their hands was due, in no small measure, to a peculiarity

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[1] The most successful attempt to reconstruct the perpetual edict is that of Lenel (1883). The order of the titles can be ascertained with some precision by comparing together the commentaries written on it by subsequent lawyers, especially Paulus and Ulpian. See Muirhead, Roman Law, p. 309.

[2] History of the Roman Law in the Middle Ages, i. p. 25.

[3] Cf. Maine, Ancient Law, p. 362.

which is worthy of attention, namely, the theoretical or scientific purpose of the work by which it was elaborated, or, rather, the complete adjustment which they effected between theory and practice, between principle and detail. The Roman jurists to whom the science of law is most indebted held themselves aloof from the vocation of the older prudentes, and left it to their own pupils, or to men of less repute than themselves. Their theory was thus always full of life, their practice always in harmony with and conducted with reference to their principles : with them ' theory and practice stood to one another in the only possible true relation, that each paid due regard to the other '. Thus the practitioner could not reproach the scientific jurist with being a mere theorist or dreamer, or the scientific jurist the practitioner with having nothing but ' a beggarly account of scraps and fragments '.[1] There are points of resemblance which make a comparison between the development of law at Rome by the prudentes, and its growth in England through a vast series of judicial decisions, both interesting and instructive ; but there is a difference of very great importance between them. At Rome the jurists did not usually act as judges, nor were the judges usually jurists, and hence it was not with strict reference only to an actual concrete case that a jurist could virtually make new law. He could do it, perhaps as early as Hadrian's time, in a legal treatise upon a hypothetical set of circumstances imagined by himself, or possibly suggested to him by a pupil or any other person; and, as is remarked by Sir Henry Maine,[2] ' where the data can be multiplied at pleasure, the facilities for evolving a general rule are immensely increased.' The development of English case law, on the other hand, has been merely the outcome of practical necessity, and from the scientific point of view is open to many of the objections which have been stated against it by Austin [3] and other writers. The Roman jurisprudence owed its perfection precisely to the fact that in it theory and practice were never in a constant state of antagonism ; whereas in England the practical disregard of the one in favour of the other, or injudicious efforts at reconciliation, have often had the effect of at once marring the theory, and perverting the practice.

Under Augustus we first find traces of a division of the jurists into two sects or schools. Their respective founders, distinguished from one another by a difference of political no less than of legal

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[1] Austin, Jurisprudence, i. p. 483. [2] Ancient Law, p. 39.
[3] Jurisprudence, Lectures 38 and 39.

views, were Antistius Labeo and Ateius Capito. Labeo had inherited from his father a strong republican sentiment, and was in the habit of lamenting the prevailing disrespect of the good old laws which had never been constitutionally abrogated. At first a pupil of Trebatius, he studied under all the prominent jurists of his day: and the width of his studies liberalised his views on law, and saved him from a failing which was not uncommon among his contemporaries, a slavish devotion to the tenets of some particular teacher. A man of varied culture and instructed in more than one department of knowledge, his leading characteristics were a wide intellectual range, a correct appreciation of the place of law in social development and of its relation to other sciences, a dislike of all pedantry, a wealth of new views and principles, with which he was ever ready to challenge and supersede the old. Socrates-like, he thoroughly perceived the value of clear logical division and definition as the basis and condition of sound legal progress. Capito was more or less of a novus homo, and a supporter of the imperial *régime*, in which he saw the best prospects of his own advancement. It is related of him that, with a false show of independence, he opposed Tiberius when the latter wished to stop the prosecution of a man accused of putting an affront upon the imperial dignity. As a jurist he was distinguished by his devotion to the letter of the law and the traditional treatment of legal questions, and by a too literal interpretation of positive rules.

The opposition between the two, which is associated with the extension of the law, which began with the Empire, from the Roman people to the whole of the Roman dominions, was thus the opposition between an absolute reliance on traditional principles and opinions supported by approved authority, and a legal mind conscious of its powers, of the living organic nature of law, of the inevitableness of its growth and expansion. It resulted in a number of legal controversies between Labeo and Capito, which they bequeathed to their successors; thus originating the two schools whose disputes were ever widening their range, and which termed their founders and leaders ' nostri praeceptores ', and those of their opponents ' diversae scholae praeceptores ', respectively. The leading disciple of Capito was Masurius Sabinus (Gaius ii. 218), from whom the school derived its name ' Sabinian ', and who, as having given it a new direction, is to be regarded as its proper founder.[1] Capito had contented

[1] Whether these schools had a local habitation, with regular courses of instruction and payment of fees, is an open question. Sabinus formed his school before

himself with a passive resistance to Labeo's innovations: Sabinus took the line of promoting the development of the law by releasing it from its traditional formalism. Among the leading Sabinians may be mentioned C. Cassius Longinus, who died under Vespasian, Caelius Sabinus, Javolenus Priscus[1] (206), Salvius Julianus (457), who has been already mentioned as the compiler of the edictum perpetuum under Hadrian, Sextus Pomponius (585), Sextus Caecilius Africanus (131), and finally Gaius (535), author of the Institutionum Commentarii quatuor, the first book, so far as we know, bearing this title and intended for elementary instruction, and also of Libri septem rerum quotidianarum sive aureorum, and Commentaries on the Twelve Tables, the lex Iulia and Papia, and the urban, provincial, and aedilician edicts. Labeo's first two successors were M. Cocceius Nerva, mentioned in Tacitus, Ann. vi. 26, and Sempronius Proculus (37), after whom this school was called Proculian; the character which he impressed upon its views was one of adherence to tradition, unrelieved by the genius of its master Labeo. His principal followers were Pegasus, praefectus urbi under Vespasian, the younger Juventius Celsus (142), and Neratius Priscus (64), whom Trajan is said to have preferred to Hadrian as his successor in the empire. After him on the one hand, and Gaius on the other, we have no further traces of the controversy between the schools.[2] It would seem that a reaction had set in, probably because differences of opinion which had once been genuine had now been degraded to mere hair splitting, or because the jurists on both sides had become possessed with the spirit of Labeo, and were beginning to revolt against the abuse of authority; at least we may infer from Gaius (iii. 98) that the pupils had taken to criticising their masters. Böcking (Institutionen, § 17) is of opinion that the disappearance of the schools is sufficiently accounted for by the condition of law and legislation in the age of the Antonines, and by the establishment of public instruc-

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Proculus, and Pomponius tells us (Dig. 1. 2. 2. 50) that he was a poor man, supported mainly by his pupils, which gives some support to this view. See Roby, Introduction to Justinian's Digest, p. cxxvii: Karlowa, Rechtsgeschichte, i. pp. 663, 664.

[1] The figures in brackets after a jurist's name denote the number of extracts from his writings preserved in the Digest.

[2] A careful enumeration of the questions known to have been matters of dispute between the Sabinians and Proculians may be found in Roby's Introduction to Justinian's Digest, pp. cxxxi–cxli. Allusions to them occur in Inst. i. 22 pr.; ii. 1. 25; ii. 13 pr.; ii. 20. 34; iii. 19. 4, ib. 11; iii. 23. 2; iii. 28. 3; iii. 29 pr.; iv. 12. 2.

tion in legal subjects, upon which more will be said hereafter. However this may be, the subsequent jurists took each his own line, though only the most famous of them need be mentioned here. From Ulpius Marcellus, commander-in-chief in Britain under Commodus, there are a hundred and fifty-nine excerpts in the Digest; Q. Cervidius Scaevola (307) was teacher of Papinian and of the emperor Septimius Severus; besides these, Claudius Tryphoninus (79), Venuleius Saturninus (71), Callistratus (29), Aelius Marcianus (275), and Florentinus (42), deserve notice. But the greatest names are yet to come. Aemilius Papinianus was esteemed by all his successors the greatest of Roman jurists. He commenced under Marcus Aurelius (A.D. 161–180) a political career which ended in his being made praefectus praetorio, next to that of the princeps the highest post in the empire, and throughout which he maintained a moral rectitude and an integrity of character to which he owed his fame no less than to his distinction as a lawyer. After Caracalla (A.D. 211–217) had murdered his brother Geta, he called upon Papinian to justify the deed before the senate and people; but the jurist replied that to accuse a man who had been wrongfully put to death was as good as to murder him a second time, and steadily refused to speak a word in the emperor's behalf; the refusal cost him his head. From his writings there are five hundred and ninety-five excerpts in the Digest, but this number is no criterion of the authority which he enjoyed in legal circles. Contemporary with Papinian was Domitius Ulpianus, who wrote principally under Caracalla, and became praetorian prefect to Heliogabalus (218–222 A.D.); he met with a violent death at the hands of the soldiers under his command in A.D. 222. Owing to the large number of his writings which were extant in the time of Justinian, the aggregate of extracts from them (2462) in the Digest exceeds that from any other jurist; in fact he contributed to that compilation nearly one-third of its contents. Julius Paulus, who sat in the council of Septimius Severus (198–211 A.D.) and was praefectus praetorio under Alexander, was author of the receptae sententiae, and is represented in the Digest by two thousand and eighty passages. The series of classical jurists closes with Herennius Modestinus, a pupil of Ulpian, and teacher of the young Maximinus about A.D. 238, from whose writings the Digest contains three hundred and forty-five extracts.

So far we have given no account of Gaius, who as the author of a text-book which is familiar to most students of Roman law, and upon which the Institutes of Justinian is so largely founded, deserves

a somewhat more extended notice. It will seem a strange thing to say that we possess less knowledge of him than of almost any other famous Roman lawyer, and yet beyond his works and approximate date we know little or nothing : even his full name appears to have been forgotten before he became celebrated. From an extract from one of his works preserved in the Digest [1] it seems clear that he lived as early as Hadrian, and from internal evidence [2] it is conjectured that the later portions of his Institutes were written shortly after the death of Antoninus Pius in A.D. 161 : the last of his writings is a 'liber singularis ad senatus consultum Orfitianum', which was enacted A.D. 178. Besides the elementary manual upon which his reputation chiefly rests, he was the author of twelve other works, including commentaries on the urban and provincial edicts, seven books 'Aureorum' (from which considerable extracts are embodied in the Institutes of Justinian), six on the Twelve Tables, and minor monographs : 535 excerpts from these volumes appear in the Digest. The only other fact which we know about Gaius, and to which a later reference will be made, is that, unlike the great lawyers whose names have been recently mentioned, his works were not made technically authoritative till nearly three centuries after their composition. There is, it is true, an ingenious hypothesis of Mommsen, which does not seem to meet with much countenance from contemporary writers, that Gaius was a provincial, and taught rather than practised the law, probably at Troas in Asia : a theory alleged to be supported by his familiarity with the Greek language and writers who employed it and with the laws of foreign peoples, and by the proportions of his treatise upon the provincial edict, which no other lawyer is known to have taken as his theme. It certainly appears strange that he omits to mention enactments made at Rome before or in his own lifetime, which have an intimate bearing on topics that he dealt with, and with which no lawyer living there could have been unfamiliar, and that his own works not only are not cited by his greater followers, but do not seem to have enjoyed any reputation till long after his decease ; on the other hand, there is some evidence in his Institutes that the courts with which he was acquainted were Roman rather than provincial. The character of his best known work has also been the subject of speculation, it having been thought that it was compiled rather as notes for professional lectures than as a set manual for elementary students. Few

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[1] Dig. 24. 5. 7 pr. [2] E.g. ii. 195.

books have had a more romantic history. Superseded in Justinian's time by that emperor's own Institutes, all trace of it was from that time lost: and it was only in 1816 that a copy of it was discovered by Niebuhr in the Chapter Library at Verona, over which a later scribe had written the Epistles of St. Jerome.

It remains to consider the nature of the influence which these great lawyers exercised upon the law of Rome, and which is mainly attributable to a change in their position coincident with the fall of the Republic. Under the free Commonwealth it had been competent to any one to profess the law, and to give advice on consultation: the form and effect of the counsel's opinions (responsa) had been under no limitations. So far as the profession, as such, left any mark upon the material system, it was through the weight of a united opinion, which in the form of 'disputatio fori' (to which effect was apparently given by the praetor) no doubt brought about a considerable expansion of the civil law. The influence of the jurists was one which the emperors would naturally find it difficult to destroy, not only because by its long and steady growth it had achieved a stature and a traditional position which might have long defied the direct attacks of opponents, but because it had always been independent of political rank, and unconnected with any constitutional office through which it might have been assailed. A significant remark is made by Suetonius,[1] that Caligula, who reigned from A.D. 37 to 41, declared that he would take care 'ne quid respondere possint praeter eum'. The craft of Augustus suggested the scheme of connecting the influence of the profession with and subordinating it to the new imperial system. He resolved to make the function of a jurist, so far as the class was to possess any authority, a quasi-public function: and this was effected by conferring on certain of the more eminent lawyers the 'ius respondendi', whereby their responsa would be given, as it were, under imperial sanction: 'et, ut obiter sciamus, ante tempora Augusti publice respondendi ius non a principibus dabatur, sed qui fiduciam studiorum suorum habebant, consulentibus respondebant. Neque responsa utique signata dabant, sed plerumque iudicibus ipsi scribebant, aut testabantur, qui illos consulebant. Primus divus Augustus, ut maior iuris auctoritas haberetur, constituit ut ex auctoritate eius responderent, et ex illo tempore peti hoc pro beneficio coepit. Et ideo optimus princeps Hadrianus, cum ab eo viri praetorii peterent,

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[1] Caius, 34.

ut sibi liceret respondere, rescripsit eis hoc non peti sed praestari solere, et ideo, si quis fiduciam sui haberet, delectari se (si ?) populo ad respondendum se praepararet' (Pomponius in Dig. 1. 2. 2. 49). Augustus himself seems to have done no more than conceive this system, for Pomponius observes, in immediate connection with the passage just quoted, that Masurius Sabinus, a knight, was the first lawyer 'qui publice respondit', and that the privilege of giving opinions to the people (populo) was bestowed on him by Tiberius, though it is possible that Augustus himself may have conferred it on men of senatorial rank, and that Tiberius was the first to grant it to men of the 'equester ordo'. There is no small difficulty in understanding this meagre notice of the genesis of the most valuable portion of the extant Roman law, which is unsupplemented by the information of any other writer of authority. Assuming that there is no difference of meaning between 'publice' and 'populo' respondere, it seems clear that to Pomponius these phrases express the same idea as 'respondere ex auctoritate principis'. The anecdote about Hadrian has been taken by some writers to show that that emperor intended to make the profession of advising counsel a monopoly of those who had received the ius publice respondendi: but it is clear that other lawyers were still consulted by clients, if not by judges, for Ulpian relates [1] that the younger Nerva gave responsa 'publice de iure' when he was hardly more than seventeen years of age: and we cannot suppose that he had received the ius respondendi while still a boy, though there is little that we cannot believe of Nero, of whom he was a favourite.[2] The requirement that official responsa should be written and sealed by their author, as a safeguard against forgery, suggests that the true difference between them and the advice of less eminent practitioners was that the former were statements of law bearing on a case actually under litigation, whether given to the judge or the litigant, and binding on the former, whose sole function, under these circumstances, was to apply the law so stated to the facts in issue.[3] That counsel should lay down the law to judge, rather than judge to counsel, will seem to English readers altogether anomalous, but the sense of anomaly will disappear if it be remembered that under the formulary system of procedure, which held its ground till nearly the end of the third century, the iudex was merely a private person

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[1] Dig. 3. 1. 1. 3.

[2] Tacitus, Ann. xv. 72.

[3] Karlowa, Rechtsgeschichte, i. p. 660.

appointed by the Praetor to hear and determine the particular case, and that it had long been the practice for these so-called 'private judges' to inform themselves respecting the law by which it should be governed by consulting the lawyers who frequented the forum for the purpose. Others,[1] again, would give the sealed responsum a more extended force, and maintain that it was authoritative not only for the case with reference to which it was issued, but for all similar cases as well. However this may be, the practice of investing certain selected jurists with the ius respondendi was continued by Tiberius' successors, and the prerogative was constantly assuming more and more of the character of a magisterial function: thus Gaius (i. 7) defines the prudentes as those 'quibus permissum est iura condere', and a later writer speaks of a jurist as being possessed of *νομοθετικὴ δύναμις*. We shall probably be safe in saying that under the Republic a iudex possessed a discretion as to accepting or rejecting the opinion of a lawyer whom he consulted. Now, however, he was obliged to decide any question of law in accordance with the advice of any jurist whom he chose to ask for it, and to whom the ius respondendi had been delegated by the emperor. Yet among those who had been invested with the privilege there was no ascertained order of precedence: how then was the matter decided, if the two parties to an action submitted discordant responsa? In such a case we must suppose that the judge was free to adopt whichever of the two opinions seemed to him the more satisfactory. But the difficulty became greater as in course of time collections of responsa came to be published by their authors, to which litigants could (according to some) appeal after their death no less than to those given by living men: and it was obviously easier every day for a party to quote from this or that jurist an opinion diametrically opposed to that brought forward by his adversary, and even to involve the judge in perplexity with an array of responsa of which no single one agreed precisely with any of the rest. A solution of this difficulty appears to have been attempted by Hadrian in a rescript of which Gaius speaks in the passage in which he is defining the responsa prudentium: 'responsa prudentium sunt sententiae et opiniones eorum quibus permissum est iura condere: quorum omnium si in unum sententiae concurrant, id quod ita sentiunt legis vicem obtinet: si vero dissentiunt, iudici licet quam velit sententiam sequi, idque rescripto divi Hadriani

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[1] E.g. Scheurl, Beiträge, pp. 121 sqq.

significatur' (i. 7). The meaning of these words is a matter of considerable dispute. According to one view,[1] Hadrian's enactment related only to the opinions of deceased jurists who had been invested with the ius respondendi; in favour of this, at any rate, is the condition of unanimity, as to which the iudex could easily satisfy himself by reference to the works of the dead. Others[2] uphold a diametrically opposite opinion, and argue that the number of living authorised counsel was always very limited: that a judge, if he desired their assistance, was required, by this rescript of Hadrian, to consult them all (quorum omnium); that if they were unanimous, but only then, their opinion might no more be disregarded than a statute might, and that when they differed the judge must settle the matter for himself. A further question is whether the written works of these privileged jurists possessed the same authority as their responsa, and if so, at how early a period this was the case. It is contended by some[3] that from the outset the authority of written works on legal subjects was equal to that of the written and sealed responsa. Others[4] hold that this force was extended from the actual responsum to published collections of responsa, and possibly to legal treatises generally, by the rescript of Hadrian; the somewhat vague definition of responsa as 'sententiae et opiniones' given by Gaius in close connection with the mention of the rescript may perhaps be thought somewhat in favour of this hypothesis, which may possibly also derive some support from a remark made by Theophilus[5] in speaking of law made by the prudentes, and from Papinian's general use of the phrase 'auctoritas prudentium' to denote any statements or records from which the opinions of jurists could be collected. That, as early as the third century of our era, the written works had come to be regarded as prima facie authoritative, is clearly shown by the law by which Constantine abolished the authority of Ulpian's and Paulus' notes on Papinian; and with this we may compare the ordinance by which Justinian directed the compilers of the Digest only to use the texts of jurists which possessed an official character.[6] But the better

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[1] Bodin, Revue his torique du droit, iv. pp. 197 sqq.

[2] E.g. Muirhead, Roman Law, 2nd ed. p. 293. For a slightly different view see Girard, Manuel élémentaire, 4th ed. p. 70. [3] E.g. Puchta, Institutionen, §§ 116, 117.

[4] Sohm, Institutionen, English edition, p. 64.

[5] τὸ δὲ παρ' αὐτῶν νομοθετούμενον γενικῷ ὀνόματι κέκληται 'responsum prudentium.' (Paraphr. i. 2. 8.)

[6] Const. Deo auctore, § 4 'iubemus vobis antiquorum prudentium, quibus auctori-

opinion would seem to be, that this process had not commenced much earlier than the time of Constantine, and that it was only very gradually that written treatises came to be regarded as possessing the same weight in the courts as is allowed to our own early luminaries, such as Glanvill, Bracton, Littleton and Coke. At that epoch the line of the great classical jurists had come to an end, and the authority which they had had, while living, was gradually transformed, by a kind of ' posthumous consecration ' to their written works.[1]

The end of jurisprudence is in general the same as that of all science ; a complete grasp, a systematic penetration of its subject-matter ; the power of following the most general propositions into their minutest ramifications, and inversely of ascending from the most concrete case, through all intermediate stages of thought, to the principle which governs it. This grasp and this power belonged in an admirable degree to the Roman jurists ; their highest qualities are their mastery of their subject, their wonderful capacity of regarding and deciding every concrete case with reference to some rule, and their logical subsumption of all their rules under a comparatively small number of great legal principles. Accordingly, in some respects their legal method left nothing to be desired. But from another point of view the Roman jurisprudence is more open to criticism. The cause may be disputed ; it may have been the backward state of general scientific knowledge or the exclusion of the jurists from all other departments of political life : but certain it is that their absorption in their peculiar study blinded them to the fact that law is but one of the agencies by which the life of a nation is developed, and that it stands in close relation to other influences all of which must play their part in duly promoting the welfare of the social organism. These other influences—literature, what are

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tatem conscribendarum et interpretandarum legum sacratissimi principes praebuerunt, libros ad ius Romanum pertinentes legere et elimare.'

[1] Beaucoup d'auteurs ont admis qu'au moins depuis le rescrit d'Hadrian la force législative aurait été attachée, dans tous les procès où on les invoquerait, à toutes les opinions des jurisconsultes diplômés, soit vivants, soit morts. Mais c'est admettre un système d'une complication pratique étonnante, dans une opposition encore plus étonnante avec le caractère ombrageux du pouvoir impérial. Le plus vraisemblable est qu'en dépit de sa formule singulière et peut-être corrompue, Gaius veut uniquement parler, comme Pomponius, des réponses invoquées dans le procès pour lequel elles ont été faites. Quant aux écrits des jurisconsultes, la force législative ne leur a été accordée que longtemps après la mort de leurs auteurs, par le droit de la période suivante: Girard, Manuel élémentaire, 4th ed. p. 70.

now called the moral or social sciences, art, and we may perhaps add, religion—they left more or less out of sight, or at any rate failed to see the inevitable correlation between them and their own favourite subject, to appreciate the function of philosophy as the common element in, the connecting link between, the various branches of human thought. As the queen of the sciences, philosophy watches over the element which they share each with one another, by keeping them before her in orderly review, by restraining each within its due sphere, by maintaining them in their proper relation, she discharges her function of giving to each its perfect form, its true development. This relation between philosophy and the sciences was not adequately perceived by the Roman jurists, because its true appreciation depends on conditions many of which are realised only in the modern world. To them jurisprudence was philosophy and all philosophy. Ulpian says, 'iustitiam colimus, et boni et aequi notitiam profitemur; aequum ab iniquo separantes, licitum ab illicito discernentes, bonos non solum metu poenarum, verum etiam praemiorum quoque exhortatione efficere cupientes, veram nisi fallor philosophiam, non simulatam affectantes.' The words are those of a moralist, not of a lawyer; and the failure to distinguish sufficiently between jurisprudence and the other sciences, notably ethics, resulted in logical faults, especially of definition, which mar in no small degree the excellences by which the Roman law is on other grounds distinguished.[1]

The mode in which the earlier prudentes acquired their knowledge of law has been already noticed. After a short preliminary instruction in the leading terms and distinctions of jurisprudence, which was denoted by the term instituere, their training was purely practical, and consisted in attending a leading lawyer in court and chambers, and in thus picking up both learning and the modes of applying it. No jurist refused the youth of Rome the privilege of thus attaching themselves to him as auditores, in order under his auspices to learn the law; indeed it was considered an honourable distinction: 'ius civile docere,' says Cicero, 'semper pulcrum fuit, hominumque clarissimorum discipulis floruerunt domus;' and of Q. M. Scaevola he says, 'qui quamquam nemini se ad docendum dabat, tamen consulentibus respondendo studiosos audiendi docebat.' This practical course of instruction continued throughout to be the

[1] See, for example, the definitions of justice and jurisprudence in the first three lines in Inst. bk. i.

principal mode in which a professional lawyer acquired a knowledge of his subject-matter and of civil procedure. The only change was that it now usually extended over a longer period ; a prominent jurist's auditores continued their connection with him even after they had attained a competent legal knowledge, in order to have the advantage of his authority and advice in their own practice. In this relation they were called studiosi. Modestinus was studiosus to Ulpian (' Herennio Modestino studioso meo de Dalmatia consulenti rescripsi ' Ulp. in Dig. 47. 2. 52. 20), and Paulus says (Dig. 50. 13. 4) ' Divus Antoninus Pius rescripsit, iuris studiosos, qui salaria petebant, haec exigere posse ' ; so that studiosi are frequently contrasted with iuris auctores, as lawyers who had not achieved an independent position. Naturally too book learning now occupied a larger share of a student's attention than before, owing to the increase and greater excellence of the juristic literature.

In the preliminary course which, as has been observed, preceded the stage in which one became an ' auditor ', there were considerable changes in the time of the classical jurists. Systematic teachers of elementary legal knowledge arose, after the pattern of the rhetoricians whom Cicero decried (Orat. 41. 42), and opened regular schools with a fixed rate of remuneration. The exact date of this innovation is uncertain, but it can hardly be later than Antoninus Pius (A.D. 138–161) ; Gellius, who wrote shortly after this period, alludes to a legal problem which in his youth was much discussed ' in plerisque Romae stationibus ius publice docentium aut respondentium ', and by the stationes ius docentium (whom he distinguishes from respondentes or jurists) he probably meant elementary schools of law. These teachers are called by Ulpian ' iuris civilis professores ' (Dig. 50. 13. 1. 5), and to the profession of a liberal art were attached some not inconsiderable privileges (see Inst. i. 26. 15) ; but they were not held in any very high esteem, such as that enjoyed by the great jurists, though some writers have erroneously thought that the latter even actually engaged in this form of instruction. But the old theory that the teaching of a liberal art should be gratuitous, which was in part the foundation of the dislike of the sophists, was maintained. Ulpian says (Dig. loc. cit.) that the iuris civilis professores could not sue in the courts for their fees, for to make a traffic of such a ' res sanctissima ' was a disgrace ; though one of the statutory privileges of all ' professors ' was the obligation of the praeses to assist them in recovering their honoraria by his extraordinaria cognitio (Dig. loc. cit. § 6).

Under Constantine (A.D. 306–337) the constitution lost its last semblance of republican form, and assumed the character of an open despotism. The most important results of this were a more rigid concentration of all executive authority, separation of the civil and military administrations, which had hitherto existed in close combination, and the institution of a graduated official hierarchy, with a consequent division of ranks and dignities. The distinctions of condition rest either on an independent foundation or on the simple will of the emperor. Of the first kind are the old contrasts between cives, Latini, and peregrini, between ingenui and libertini, and between men of unblemished civil reputation and infames; also a new one between proprietors and non-proprietors of land. Of the second kind are the patriciate, a new distinction devised by the emperors as a reward for faithful service in the state or in the field, and the other dignities of the court and of the civil and military administration, dignitates palatinae, civiles, militares. All of these were arranged in a fixed order of precedence, and differentiated from one another by terms of honour such as illustris, spectabilis, clarissimus. It would be tedious, however, to enter into a full account of these, though more or less connected with the subject of legislative power. Constantine's three sons, Constantine II, Constantius, and Constans (A.D. 336–361), by their internal discords and the weakness of their efforts to suppress other pretenders to the throne, paved the way to the final division of the empire into West and East, which took place under Arcadius and Honorius, A.D. 395. For some generations the two empires subsisted side by side with one another. From the commencement of the fifth century, however, the Germanic peoples began to intrude themselves into the dominions of the Western Emperor, and their aggressions became year by year more menacing, until, after having long been a mere object of booty to the barbarians, the Western Empire was finally absorbed in their conquests A.D. 476.

From this brief notice of the political history we turn to a more appropriate subject, the condition of the law in the period intervening between Constantine and Justinian. Of the influences to which must be attributed the general character and tendency of its development one is intimately connected with the division of the empire into West and East. The jurists had raised the ius gentium to a level with the ius civile, and had esteemed naturalis as powerful a principle as civilis ratio. But among the peoples which composed the Eastern Empire, and which were Roman in name only, it was

inevitable that the universal should gain the preponderance over the particular jural element, as more favourable to the survival of the legal system beyond the life of the individual nation ; the part which was 'civitatis proprium' and strictly national could not fail to decay and gradually disappear. Old legal dispositions, such as mancipatio and in iure cessio, were practically superseded by free forms peculiar to no single nation, and simultaneously the distinctions of cives, Latini, and peregrini ceased to have any real meaning, even if they were still occasionally to be found ; thus the old separation of ius civile and ius gentium rapidly tended to disappear by the former becoming absorbed in and swallowed up by the latter. Secondly, it is to be observed that Constantine had publicly sanctioned Christianity, which Theodosius further proclaimed as the religion of the state : and the effects of this began to show themselves at once in the field of private law. There was thus infused into both legislation and judicature the spirit of a higher equity and a diviner justice than had been familiar to the classical jurists, which left its traces during this period on many of the rules relating to slavery, colonatus, marriage, concubinage, and patria potestas. Justinian himself legislated openly in favour of the Church ; for examples of this reference may be made to the index to the text (s. v. 'Church'). Lastly, the constitutional changes which have been briefly noticed produced modifications in private law through the revolution which they effected in judicature, and consequently in civil procedure, and which will be treated in a later part of this book.

The legislative authority by which the legal changes thus generally described were introduced requires some notice. The old magistrates of the populus had now formally been transformed into imperial officials, and we can hardly believe that the latter could have deemed themselves competent to exercise the praetor's function of harmonising the 'strictum ius' with the 'ius aequum' by their own independent action. 'Ex abundanti cautela,' however, Constantine issued a constitution expressly forbidding them to attempt any such task : 'inter aequitatem iusque interpositam interpretationem nobis solis et oportet et licet inspicere' (Constantine in Cod. 1. 14. 1). Nor is it to be expected that, under such conditions as those of the Eastern Empire, new law could be begotten by usage. Usage or custom, so far as it is fitted to become law, is grounded upon a common apprehension of an unwritten rule, upon a common conviction that so and so is right and ought to be done. Now the peoples of whom the empire was composed were so diverse that

they had but one characteristic in common, viz. that they were not Romans. They could have no common legal habit as a nation, and thus could generate no new positive customary law save merely local rules; the only influence they could unite to exercise was a negative one, to abandon all such portions of the system as were purely and exclusively Roman. And this destructive work, as we have seen, they did do. So with the other sources of the ius scriptum which are enumerated in the Institutes (i. 2. 3). Leges proper, plebiscita, and senatus consulta, as we know, had long been obsolete; and it has been seen that all growth of the ius honorarium had ceased since the time of Hadrian. Still, the development of law might have been carried on, as it had been from Augustus to Maximian, by the responsa prudentium and systematic treatises of authorized jurists; but we look in vain for these forms of legal activity, for true jurisprudence had already died a natural death. The juristic literature of the period now under consideration consists merely of compilations from statutes or constitutions and from the writings of earlier prudentes. Theodosius II (A. D. 408-450) attests the cessation of true juristic work in the enactment by which he promulgated his codex constitutionum: 'saepe nostra clementia dubitavit, quae causa faceret, ut tantis propositis praemiis, quibus artes et studia nutriuntur, tam pauci raroque extiterint, qui plena iuris civilis scientia ditarentur, et in tanto lucubrationum tristi pallore vix unus aut alter receperit soliditatem perfectae doctrinae.' His own explanation of the phenomenon is the vast multiplicity of imperial ordinances and juristic books without an adequate study of which a knowledge of the law was impossible; and the hope is expressed that a remedy for this will be afforded by the comparatively small dimensions of his own compilation.

Direct imperial legislation thus remained the only form in which changes could be effected in positive law. What Justinian says in Cod. 1. 14. 12 is true of the whole period extending backward from himself to Constantine: 'In praesenti leges condere soli imperatori concessum est, et leges interpretari solum dignum imperio esse oportet;' and this will account for the ever-increasing activity of the imperial legislation. In the interval of 130 years between Constantine and Theodosius II the mass of general constitutions had already become so great that the latter emperor's compilation formed a book of very considerable dimensions, and yet in this much was curtailed, still more omitted; for instance, it contained none of the enactments of Diocletian, whose contributions in the code of Justinian number 1247.

We have already touched upon the practical difficulties which arose in the application of responsa to the judicial decision of actions which came before the courts, and noticed the different views which may be held as to the meaning of Hadrian's enactment upon this subject. In the 200 years which had elapsed between the period marked by the names of such men as Ulpian and Papinian and the age of Theodosius II these difficulties had considerably increased, and it had become imperatively necessary to discover some further remedy. That which most immediately suggested itself was to limit the authority which this literature in general enjoyed to a moderate number of books, a plan which had already in its favour the rough scheme of precedence which general practice had established among the works of the classical jurists. Certain books had acquired a prescriptive authority in the various schools of law, public and private, which were located in various parts of the empire. A student commenced with the Institutes of Gaius, which were followed by the Commentaries on the Edict, especially those of Ulpian and Paulus, and the latter's responsa, quaestiones, and receptae sententiae: the course closed with Papinian and Modestinus. The writings of these five jurists had thus obtained a preponderance which naturally extended itself from the schools to the tribunals. Yet among them there were a great many controversies, and in this epoch neither the emperor nor the parties to an action were likely to be satisfied with the rule which Gaius (i. 7) states on the authority of Hadrian, that where jurists of different views were cited the judge might adopt whichever of the conflicting views he pleased. In order to obviate these difficulties, Constantine had (A. D. 321) deprived of all validity the notes of Ulpian and Paulus on Papinian, in which they had often found occasion to controvert his opinions. A more complete remedy was provided by the so-called 'law of Citations', issued A. D. 426 by the emperors Theodosius II and Valentinian III. By this it was enacted that when conflicting opinions were cited in a court of justice from juristic writings with statutory authority, that opinion should be adopted by the judge in whose favour most jurists were brought forward; if the numbers were equal, the view of Papinian should prevail; if, in case of equality, no definite opinion on the case in hand could be extracted from this jurist, the judge might select from the conflicting views at his own discretion. It thus became the business of the parties to relieve the judge of the labour of collating the 'iuris auctores'. The procedure is compared by Rudorff to that of the imperial council, or court of appeal, in which

the majority of votes had always won the day ; ' when it had ceased to be usual to convoke and consult living jurists, the practice was transferred to the councils of the dead.' So far the ' law of Citations ' creates no difficulty ; but as to the effect of another passage there has been much diversity of opinion. That passage runs as follows : ' Papiniani, Pauli, Gaii, Ulpiani atque Modestini scripta universa firmamus, ita ut Gaium, quae Paulum, Ulpianum et cunctos comitetur auctoritas, lectionesque ex omni eius opere recitentur. Eorum quoque scientiam, quorum tractatus atque sententias praedicti omnes suis operibus miscuerunt, ratam esse censemus, ut Scaevolae, Sabini, Iuliani atque Marcelli, omniumque quos illi celebrarunt, si tamen eorum libri, propter antiquitatis incertum, codicum collatione firmentur. Ubi autem diversae sententiae proferuntur,' etc. (Cod. Theod. 1. 4. 3). This is explained by some writers [1] to mean (1) that statutory force was hereby for the first time given to the works of Gaius, Papinian, Ulpian, Paulus, and Modestinus, and to those of other prudentes who were therein cited; and (2) that all other juristic literature (including the notes of Ulpian and Paulus on Papinian) was in future to have no validity whatever. If this interpretation is the true one, the view which has been above stated, that the writings of authorized jurists had for some time possessed authority equal to that of their responsa, is clearly erroneous. But the arguments against it are extremely strong. Though the 'law of Citations' confirms the authority of the five leading jurists, it is very far from expressly excluding the authority of others ; it mentions others, and clearly only exempli gratia, as representative of the great mass of other juristic literature ; and the weight which it allows to these others is not less, except in cases of equality of voices, than that of the five. Secondly, it is to be observed that the works of other jurists are frequently cited as authorities by later emperors (e. g. Julian by Leo and Anthemius in Cod. 6. 61. 5 ; Marcian by Justinian in Cod. 7. 7. 1 ; Tertullian in Cod. 5. 70. 7). But the strongest argument of all is to be found in the Constitutions issued by Justinian with reference to the compilation of the Digest, in which he instructs the compilers to make excerpts from the authorized jurists, and in the fact that, acting under this commission, they selected thirty-eight writers, and inserted in the work passages from every one of them;

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[1] E.g. Savigny, System, i. § 26; History of the Roman Law in the Middle Ages, p. 28. The view adopted in the text is supported by Puchta, Bethmann-Hollweg, Danz, and Karlowa.

this they could not possibly have done if the only authorized jurists at the time of their appointment had been the five whose names have been mentioned. And the force of this fact is irresistibly increased by the words used by Justinian in Cod. 1. 17. 2. 20 with reference to the publication of the Digest, where he says that he has therein made selections from the jurists (legislatores et commentatores) 'quos et anteriores piissimi principes admittere non sunt indignati'.

It would seem then that the true meaning of the disputed passage is that which has been given to it by other civilians ; [1] namely, that it was intended to supply a criterion by which the authority of any and every juristic writer could be tested. Its intention was not to exclude any authorized jurist, but to remove the difficulty which arose from the existence and quotation of works by writers who had received no auctoritas or ius respondendi, and to which Justinian bears witness in Cod 1. 17. 1. 4. The test was to be the ius respondendi, and the possession of this was to be inferred from the fact of one jurist being cited as an authority by another of undeniable reputation. The legislator attained his object by selecting a small number of the most recent and distinguished jurists who had possessed the ius respondendi, and by confirming their authority, and also that of all others whose views they quoted. Some difficulty is occasioned by the words 'si tamen eorum libri propter antiquitatis incertum codicum collatione', which seem to mean that even when a jurist is cited by one of the five, he is not to be allowed a voice in the decision of a case unless his view, as quoted, is proved and confirmed by a comparison of the passage of the citing jurist with the original work (codices) of the author quoted. The enactment would thus practically secure to all approved writers the weight which they had hitherto enjoyed, while it would relieve judges of the weary task of listening to the opinions of others of only second-rate importance ; it excluded only jurists who had never possessed a first-rate reputation, and in particular those who lived after Modestinus.[2]

The only subject with which we have yet to deal, before proceeding

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[1] E.g. Puchta, Institutionen, vol. i. p. 372 (8th edition, 1875).

[2] The opening words in the passage transcribed above from the 'law of Citations', by which the statutory authority which the other four leading jurists had always possessed is extended to Gaius, go to show that the latter was not a 'iuris auctor', and had never been invested with the 'ius respondendi'. This inference is supported by the fact that, though his writings were so various, they contained no responsa, though among them was a 'liber de casibus', in which he collected a large number of illustrative cases, many of which were imaginary, while of the real ones none had been authoritatively pronounced upon by himself.

to speak of the legislation of Justinian, is that of the codices constitutionum, or compilations of imperial ordinances, which spread themselves over about two and a half centuries. The first with which we are acquainted is the codex Gregorianus, a collection mainly of rescripts issued from the time, probably, of Hadrian up to A.D. 284, and principally rescripts of Septimius Severus and the emperors who succeeded him. Its exact date is uncertain, but it cannot well be placed earlier than A.D. 295; its arrangement was based upon that of the current commentaries on the Edict. Another compilation of the same character is the codex Hermogenianus, which may be regarded as an appendix to the foregoing. The oldest constitution which it contained was issued A.D. 290 or 291; the great majority of them belong to Diocletian and Maximian (A.D. 284–305), though seven enacted by Valens and Valentinian, about A.D. 365, are also referred to it; if this is correct, its composition must lie between A.D. 365 and A.D. 398, but there are civilians who place it many years before the earlier of these two dates, and accordingly deny that it could have comprised constitutions of Valens and Valentinian. Both of these codices, so far as we know, were formed by private persons, that is to say, not under the authority of an imperial commission; they were in constant use both in the West and in the East, and lost their importance in the latter half of the empire only by being absorbed in his own code by Justinian.

The contents of the so-called 'Vatican fragments' are more miscellaneous. They are portions of a compilation of excerpts from juristic writings and imperial rescripts and edicts, and were discovered in 1820 and first published in 1823. The author is unknown, but the date of the work must be between A.D. 372 and A.D. 438, for it contains a constitution issued in the first of these two years, and in the latter the Theodosian code was published. The jurists whose works are most largely laid under contribution are Papinian (responsa and quaestiones), Ulpian (libri ad edictum, etc.) and Paulus (libri ad edictum, sententiae, responsa, quaestiones, etc.); Celsus, Julian, and Pomponius are also often cited. The work seems to have had a purely practical purpose, and was arranged in Titles subdivided into rubrics. Seven of the Titles are extant, relating to the following subjects: (1) ex empto et vendito; (2) de usufructu; (3) de re uxoria et dotibus; (4) de excusatione; (5) quando donator intelligatur revocasse voluntatem; (6) de donationibus ad legem Cinciam; (7) de cognitoribus et procuratoribus.

In A.D. 429 Theodosius II, Emperor of the East, informed the

senate of his resolution to codify the constitutions of Constantine I (A. D. 306–337) and all his successors by means of a commission of nine persons: 'Ad similitudinem Gregoriani atque Hermogeniani codicis cunctas colligi constitutiones decernimus, quas Constantinus inclytus et post eum divi principes nosque tulimus, edictorum viribus aut sacra generalitate subnixas' (Cod. Theod. I. I. 5). Nothing, however, was done till A. D. 435, when a fresh commission of sixteen persons was appointed for the purpose, with power to make alterations in individual constitutions. The result was the Theodosian Code, promulgated in February A. D. 438, with statutory force from and after the commencement of A. D. 439, as the only authority for the 'ius principale', or imperial legislation, from Constantine I to that date. It consisted of sixteen books, arranged separately in Titles and rubrics, and the constitutions in each Title were placed in chronological order. The first five books were arranged on the plan of the commentaries on the Edict, and contained most of the enactments relating to private law. The sixth to the eighth books consist principally of constitutional and administrative ordinances; the ninth is criminal law; the tenth and eleventh relate to the financial system, and in part to procedure; the twelfth to the fifteenth, to the constitution and administration of towns and other corporations, and the sixteenth contains the constitutions which deal with the church and the ecclesiastical system in general. This code was accepted in the West as well as in the East, and partly thus, partly by the 'law of Citations' of twelve years' earlier date, uniformity of law was secured throughout the two halves of the empire. Precautions were also taken against subsequent divergence: the two governments agreed that constitutions which either might find occasion to make should be communicated by the one to the other, and subject to revision by mutual consent be published by both legislatures; in default of this procedure they should have no universal validity. In contradistinction to the code, such single enactments were called novellae leges or novels; a number of them were issued by Theodosius, A. D. 448, and confirmed by Valentinian III in the West in the following year. The joint style of enactment was actually followed till A. D. 455, and there are several collections of novels which belong to this period. From A. D. 455 the tie between the two empires was greatly weakened, though Anthemius (A. D. 467–472) published in the West an enactment issued in the East by Leo: formally, however, the connection was maintained, so that the new constitutions still bore the names of both emperors, though the

place of their issue or the province of the magistrates to whom they were addressed enable one to infer to which of the two empires they more properly belong.

Certain compilations of Roman law made by the barbarians who swept away the Western empire deserve a passing notice. (1) Among the Ostrogoths, whose king Theodoric (A.D. 475–526) conquered Italy in A.D. 493, and ruled it as representative of the emperor at Constantinople, the Roman and German systems did not, as elsewhere, stand in opposition to one another, but the Gothic invaders resigned their own law and submitted themselves to that of Rome. The 'Edictum Theodorici' is a collection of the most practically important rules of Roman law arranged in statute form for the purpose of enabling the countrymen of Theodoric to know the law under which they lived, and is based on the imperial constitutions and the sententiae and responsa of Paulus. Among the Visigoths and Burgundians, on the other hand, the original subjects of the empire retained their own jurisprudence, to which their conquerors declined to submit themselves. Thus (2) the codex Alaricianus (or breviarium) was a kind of Digest of the law observed by the Roman subjects of the Visigoth king Alaric II (A. D. 484–507), comprising, besides imperial constitutions, very large portions of the commentaries of Gaius, and excerpts from the sententiae of Paulus and Papinian's liber I responsorum. (3) A compilation of Roman law for the Roman subjects of the Burgundian empire was made by order of king Sigismund about 517 A.D.; it is usually termed 'Papian' (abbreviated from Papinian, because it is said to have commenced with that jurist's liber I responsorum) and contains forty-seven Titles, part of which are taken from the code of Alaric.

Justinian, who was of Sclav descent, was at the age of forty-five (A. D. 527) raised by his uncle Justinus to the position of joint ruler of the Eastern Empire, and in the same year, by the death of his partner, he became sole emperor. In the interval of somewhat less than a century which had elapsed since the legal reforms of Theodosius and Valentinian, a process of divergence had been constantly going on between the law as laid down in the code of Theodosius and the 'law of Citations', and the law as actually applied in the tribunals. This was principally due to the small number of copies which existed of the authorized enactments and juristic literature: 'Homines etenim, qui antea lites agebant, licet multae leges fuerant positae, tamen ex paucis lites praeferebant, vel propter inopiam librorum, quos comparare eis impossibile erat, vel propter ipsam inscientiam, et

voluntate iudicum magis quam legitima auctoritate lites dirimebantur' (Justinian in Cod. I. 17. 2. 17). It had thus become extremely necessary that these should be multiplied, and also, if possible, recast in a more convenient form, which should enable such alterations to be made in the substantive law as circumstances demanded, and also secure the incorporation in the main work of the detached constitutions which had been published since the code of Theodosius. Theodosius had himself conceived the design of combining the writings of the authorized jurists and the imperial legislation (which had now been long contrasted under the terms ius and leges) in one comprehensive statute book; but the idea of combination had produced no results, and of that emperor's two great reforms the one related to ius, the other to leges only. When Justinian had resolved on his great scheme of giving a new form to the Roman law, the enormous mass of the material and the convenience of dividing the labour of codification caused him to prefer the retention of the two elements of the ius scriptum in separation. He also hesitated whether to retain them in their existing shape, subject of course to such alterations as were called for by the necessity of harmonising them *inter se*, and with the law as at present administered, or, while preserving their tenor and substance, to completely alter their literary form; he tells us that a regard for the past, and admiration for the services which the jurists and his imperial predecessors had rendered to jurisprudence, had decided him in favour of the former alternative.

The codification of the imperial legislation, as having been in part already executed, presented the least difficulty; its claim was also the more pressing, because all imperial officers were required by law to possess copies of the existing codices. This task was accordingly first taken in hand. In A.D. 528 Justinian appointed a commission for the purpose of ten persons, among them being Tribonian, who played so important a part in the legislative work of the next few years, and who not improbably suggested to his master his whole scheme of legal reform. The work with which they were entrusted was to form a single code out of the codices Gregorianus, Hermogenianus, and Theodosianus, and the constitutions issued since A.D. 439; omitting all that was superfluous, reconciling such enactments as were inconsistent with one another, and, where convenience required, combining several into one ('colligentes vero in unam sanctionem, quae in variis constitutionibus dispersa sunt, et sensum earum clariorem efficientes'); finally, they were authorized to make any alterations in individual constitutions which they should deem

necessary ('adiicientes quidem et detrahentes, immo et mutantes verba earum, ubi hoc rei commoditas exigebat'). The separate laws were to be arranged in chronological order under generic titles, and each, so far as was possible, identified by date and the name of the prince to whom it owed its introduction. The work was completed in April A.D. 529, and was published under the name codex Justinianeus with force of law from the 16th of that month. The older codices and constitutions were at the same time deprived of all validity, and it was even forbidden to appeal to any leges cited in the juristic writings, if they had been incorporated, even in a modified form, in the new code.

The task of dealing in a similar manner with the writings of the jurists was not commenced till the end of the year A. D. 530, but the intervening months had been employed in a preparatory labour which could not be dispensed with, and the purpose of which was a rough settlement of the points in controversy between the prudentes. This had been done by a series of fifty constitutions, known as the quinquaginta decisiones, which were regarded as a separate compilation: 'Postea vero, quum vetus ius considerandum recepimus, tam quinquaginta decisiones fecimus, quam alias ad commodum propositi operis pertinentes plurimas constitutiones promulgavimus, quibus maximus antiquarum rerum articulus emendatus et coartatus est.' Subject to these, the commission appointed to execute the work, which consisted (besides Tribonian, who superintended it throughout) of sixteen persons, possessed the same powers of omission, alteration, and modification as had been exercised by the compilers of the Code. They were instructed not to limit themselves to the five leading jurists who occupy so prominent a position in the 'law of Citations', but to select whatever was valuable in the works of all the 'juris auctores'. The only exception to this was their admission of Arcadius Charisius and Hermogenian, both of whom lived after Modestinus, and accordingly had not possessed the ius respondendi. The total number of jurists upon whom they drew for their materials was thirty-eight: and Tribonian himself informs us that the commission dealt with two thousand 'libri' and three million 'versus' (lines ?), of which they selected about one twentieth part. There has been no little speculation [1] as to the principle which they followed in arranging their matter in the fifty Books, the number of which had been determined by Justinian himself; but there seems

[1] E.g. Roby, Introduction to Justinian's Digest, chap. iii.

no reason to doubt that they obeyed in the main his instructions, which were to adopt the order which was ready to hand in the Code and in the Perpetual Edict, though some authorities profess to be able to identify here also the arrangement under persons, things, and actions so familiar in the Institutes of Gaius and Justinian. Each book was divided into Titles, headed by a brief indication of their respective subject-matter, and the excerpts from the writings of the jurists, of which the Titles consisted, were distinguished by the name of the jurist and of the specific work from which they were taken. As to the mode in which the extracts were disposed in the separate Titles the theory of Bluhme is now generally accepted, according to which the commissioners were broken up into three committees, to each of which was assigned the task of reading and making extracts from a particular portion of the works to be digested. These accordingly were divided into three groups, the first of which comprised Ulpian's commentary on Sabinus, and similar treatises on topics mainly governed by the civil law: the second, the bulk of the commentaries on the Perpetual Edict: and the third, Papinian's writings and supplementary works: they are termed the Sabinian, the Edictal, and the Papinian groups respectively, and are estimated by Bluhme to have contributed to the total result in the proportion 5, 4, and 3. When each of the three committees had completed its portion of the work they met together, and their contributions were collocated rather than combined under each Title, the most considerable being placed first, and the others following after excision of portions dealing with points already sufficiently treated in the main contribution.[1]

The whole work was called Pandectae or Digesta, the latter name being derived perhaps from Justinian's expression in the ordinance appointing the commission ('codex in quinquaginta libros digestus'), or more probably from a work of Salvius Julianus which bore the same title. It was published on Dec. 19th, 533, with statutory force from the 30th of the same month, and the use of the juristic writings from which it was compiled was for the future interdicted; along with the Code and the Institutes, it was intended to form the exclusive authority for the earlier law. Though the names of their authors had been prefixed to the individual excerpts, Justinian ordained that they should be taken to be immediately enacted by himself, and to

[1] For a fuller explanation see Roby, op. cit., ch. iv.

derive their force from him, not from the reputation of the jurist or from the emperor who had conferred on him the ius respondendi; finally, in order to prevent all controversies in the future, he forbade all commentaries on the Digest, allowing only Greek paraphrases and summaries of the contents: 'Omnibus similiter interdicimus, ne quis audeat hominum, qui sunt nunc, aut in posterum erunt, commentarios scribere harum legum, praeterquam si velit quis in Graecam linguam haec transferre, quem etiam volumus sola secundum pedem seu κατὰ πόδα nuncupata uti legum interpretatione, et si quid secundum nominatorum paratitlorum, ut conveniens est, adscribere voluerit usum. Aliud autem nihil omnino ne tantillum quidem circa ea facere, nec rursum dare seditionis et dubitationis, aut infinitae multitudinis legibus occasionem' (Justinian in Const. 'dedit nobis', 21).

With the completion of the Code and the Digest, which between them exhausted all the sources of Roman law, Justinian's plan was fully executed. These bulky works, however (as Justinian himself observes in Inst. Prooem. 3), were ill-suited for the elementary instruction of students. Accordingly, as the commentaries of Gaius and the other books which had long formed the curriculum of the schools had been deprived of all force, and their very study forbidden, or at least discouraged, it was necessary to bring out a new work in lieu of them. Upon this there had been engaged, even during the composition of the Digest, a small committee consisting of Tribonian, Theophilus, and Dorotheus, the two latter being professors of law at Constantinople and Berytus respectively, and already members of the Digest commission. The book which they produced was called 'Institutions of Justinian', though in England it is better known as the 'Institutes'; in form, and to a great extent also in substance, it was founded on the commentaries of Gaius, but also contained large extracts from the 'Aurei' of the same writer, as well as from the 'Institutiones' of other jurists (e. g. Ulpian, Marcian, and Florentinus); finally, by apt references to the Code, it was so 'brought up' to the present date as to give the student a general conspectus of the rules of private law then binding.

It will here perhaps not be unprofitable to inquire briefly, from the point of view of general jurisprudence, what is the field and what the subject-matter of private as distinguished from public law; and in pursuing this inquiry the method and terminology of Savigny seem preferable to those of the English analytical school of jurists, not only because the student, if not already familiar with the latter, can

easily become so by reference to standard works,[1] but also because a consideration of the German arrangement will enable him to understand more fully the logical completeness and the interconnection of the parts of the Roman system. Savigny represents jurisprudence as the science of legal relations, and a legal relation is a relation between person and person defined and determined by a rule of law: this determination by a rule of law consisting in the assignment of a sphere or province to the individual will, in which it is supreme and independent of every other will. Private law then will be the aggregate of those positive rules which define and determine the relations between men in their private capacity, and its subject-matter will be fully discovered by ascertaining the possible kinds of legal relations. This is done by reverting to the effect of a rule of law on the relation between man and man; that is to say, by considering the objects on which the human will can operate. These are, in brief, one's own person, and the external world; the latter again being divided into reasonable and unreasonable, or persons and things.

As regards one's own person, our attention is at once directed to the so-called primordial rights, or rights of personal inviolability in respect of freedom, reputation, and so forth. These, however, apart and by themselves, Savigny does not consider a proper subject of law. He admits that a man ought to have the sole control of his own person and powers, but the right to such control does not fall within the ken of the law except as the basis of rights and relations which belong to other parts of the code—which, that is to say, ought not to be regarded simply as developments of this personal inviolability, from which their content is clearly distinguishable (System i. p. 336–7). 'Acquired rights' are thus the only proper subject of private law, and these, as has been pointed out, can relate to either persons or things.

i. Over unreasonable portions of the external world, or things, a person may exercise absolute control. Such absolute control is called dominion or ownership, and the law relating to it is known as the law of things (Sachenrecht). Ownership, however, is capable of many forms and modifications; the separation of its elements leads to the conception of servitudes and other rights in re aliena; and again, its actual exercise is distinguishable from the right, whence arises the law relating to Possession. The main elements of

[1] Especially Austin's Lectures, and Holland's Jurisprudence.

the law of things will thus be Ownership, iura in re aliena, and Possession.

ii. To the reasonable portion of the external world, or to other persons, one may stand in either of two quite different relations. Firstly, one man may be related to another somewhat in the way in which, as we have seen, he may be related to things. Over a thing he may exercise complete dominion, in which case it is absolutely subjected to his will; over a person he cannot exercise this power, which implies an entire negation of freedom and personality. But he may exercise a partial dominion, a dominion which consists with that other person's freedom, inasmuch as it does not extend to all his actions, but only to one or some of them. If one man is absolutely subjected to the will of another, he is, jurally, not a person, but a thing; but if that other is, jurally, master of only certain of his actions, and jurally entitled to compel him to this or that act or forbearance only, he is, except in respect of this portion of his activity, still free and a person. We thus get the idea of obligation as distinct from dominion, and these together form the two parts of what is called the law of property, the relation between them being twofold: (*a*) if one person refuses to perform the act which he is bound to perform in favour of another, the law will condemn him to pay pecuniary damages, the obligation being thus transformed into ownership (of money): (*b*) the object of the vast majority of obligations is the acquisition or the transitory enjoyment of dominion. But, secondly, one man may be related to another as being, along with him, a member of the organic whole, humanity. In obligation a person is regarded as an individual atom, standing apart by himself; here he is regarded as a being incomplete, and finding his completeness in the great interconnection of nature. This is especially observable in two points: (*a*) the distinction of the sexes, whose incompleteness is perfected in marriage: and (*b*) the limited duration of human life; and here the deficiency is supplied by the perpetuation of the race, which leads us to the idea of the periods of human life, infancy, puberty, manhood, etc., and the connected theme of education, with the control of one person by another which this implies. These are grouped together under the idea of parental power, with which is intimately connected the notion of kinship. Marriage, parental power and kinship form together a department of the private code which we may call family law.

We can thus picture to ourselves three concentric circles, within which the human will can exercise its supremacy: (i) The original

self, the so-called rights to which are not, according to Savigny, properly subjects of jurisprudence. (ii) The self expanded in the family; the legal relations comprised under this belong to family law. (iii) The external world apart from the family; the rights which arise from the relations to this of the individual will belong to property law, in its two departments, law of things, and law of obligations. Though however the field of private law has thus been mapped out into three great departments, family law, law of things, and law of obligations, with their three great corresponding classes of rights, these can be thus sharply separated only in abstraction, and a further development is accordingly desirable in two directions. Firstly, the rights and duties which arise from many legal relations seem to belong, for some reasons, to family law, for others to the law of property; that is to say, there are some forms of ownership and of obligation which cannot exist apart from the family, and which in fact are of supreme importance in investing the family with a jural character. In the Roman law, for instance, the institutions of dos, donatio propter nuptias, peculium, patronatus, and the contractual relations enforced by the 'actiones adiectitiae qualitatis' are of this character. Legal relations of this kind may with convenience be classed by themselves under the head of applied (as distinct from pure) family law. Secondly, the relation of the law of inheritance or succession to the classification so far suggested is by no means clear. If, however, we ask what is comprised in the idea of an inheritance, the reply must be, the relations of the deceased person in the departments of ownership and obligation, or, as the Romans significantly expressed it, his universitas iuris; his successor takes his property, and has to pay his debts. The law of succession is thus a division of the law of property, but its importance in all legal systems forbids our making it a merely subordinate division. Rather, we should divide the latter into simultaneous and successive property law; the former comprising the law of things and the law of obligations, the latter the law of inheritance.

The field of private law then comprises five great departments:—

i. Pure family law, including marriage, parental power, kinship, and the relation of guardian and ward.

ii. Applied family law.

iii. The law of things, under its three main heads of ownership, possession, and iura in re aliena.

iv. The law of obligations.

v. The law of inheritance.

It must not be supposed that this is the classification of the Roman lawyers; it is one which Savigny arrives at by an *a priori* method, and, so far as we know, there was not one among the prudentes who in his systematic writings arranged his subject-matter upon this principle. The reason why the outlines of Savigny's system have been so fully considered is, partly, to suggest to the reader an alternative classification to that of the analytical school, partly to show how complete the Institutes of Justinian, and their model the Institutes of Gaius, are in their material if not in their formal treatment of private law. Marriage, parental power, kinship, and guardian ship are treated with great fulness in Book i. Applied family law forms no compact, independent part of the work, but is found, to some extent, distributed among the other departments. Thus, though dos is not explicitly treated, donatio propter nuptias is discussed as one of the forms of gift in Book ii. Title 7. The capacity of a filiusfamilias (*a*) to own property independently of his pater is noticed in Book ii. Titles 9, 11, and 12; (*b*) to bind his pater by his contracts in Book iv. Title 7: his position in respect of delict is the subject of Title 8 in the same book; the relation of patron and freedman, though only with reference to the former's rights of succession to the latter, is treated in Book iii. Title 7; the effect of adoption on the property and debts of the adopted in Book iii. Title 10. Ownership and iura in re aliena are comprised in Book ii. Titles 1 to 9; possession is touched upon incidentally only, in connection with usucapion (Book ii. Title 6) and interdicts (Book iv. Title 15). Obligations occupy Book iii. Title 13 to Book iv. Title 5; and inheritance, testamentary and intestate, with the cognate topics of legacy and fideicommissum, is the subject of Book ii. Title 10 to Book iii. Title 9. The consideration of the arrangement adopted by Justinian himself after Gaius is reserved for the introductions to the separate books, in which too the reader's attention will be called to the chief particulars in which the law of Justinian had advanced upon that of Gaius, or in which the rules stated by the latter had become obsolete, and thus a mere matter of antiquarian learning, in the age of the former.

The Institutes were published on Nov. 21, A.D. 533, with statutory force, along with the Digest, from Dec. 30th of the same year. At the same time Justinian fixed the system of study to be in future followed in the public schools of law. The course was to occupy five years. The first was to be devoted to the Institutes and the first four books (πρῶτα) of the Digest; the second, to the parts of the

latter relating to judicia and res creditae (Books 5–19), and also to certain portions of later books dealing with the proprietary relations of husband and wife, guardian and ward, and testaments and legacies. In the third year Books 20–22 of the Digest were to be studied, and also certain portions to be gone over again which had been already read in the preceding year. These were to be followed, in the fourth year, by the parts of Books 20–36 which had not already engaged the student's attention. The subjects prescribed for the last year of the course were Books 37–50 of the Digest, and the Code ; these were read privately, so that the subject-matter of the professorial lectures, which spread themselves over the first four years, were the Institutes and the first thirty-six books of the Digest.

Justinian's design had been to embrace in his three authoritative works every jot and tittle of positive law. It was transparent, however, as things stood at the end of A.D. 533, that this object had not been fully attained. The Digest and the Institutes, from the point of view of the legal reformer of that epoch, left little to be desired ; but it was at once perceived that the Code of A.D. 529 was far from complete ; the great majority of Justinian's own constitutions had been issued subsequently to its promulgation, and Tribonian, who had not been president, but merely an ordinary member of the commission which had compiled it, was naturally not backward in calling his master's attention to this imperfection. Justinian, therefore, in A.D. 534, appointed a new commission, consisting of Tribonian, as president, and four others, to revise the Code of A.D. 529. Within a few months the latter, and also the constitutions issued after its enactment, were deprived of all authority, and withdrawn from circulation, their place being taken by a new Code, known as the ' codex repetitae praelectionis ', in which were incorporated Justinian's own constitutions, as well as many others which the earlier code had not contained : some again which had stood in the latter were now omitted, and there were numerous alterations and interpolations, Tribonian sparing no pains to make the revision as complete as possible. The codex repetitae praelectionis was promulgated on Nov. 16, 534, with statutory force from the ensuing 29th of December. It consisted of twelve books, and in arrangement followed very closely the order of the Digest.

The adversaries of codification have made great capital out of an error into which its advocates have sometimes fallen, and which consists in supposing that a good Code dispenses with the necessity of

any further legislation; they have even accused Justinian of believing that in his three great bodies of law was summed up the perfection of human wisdom, and that they would suffice, without addition or alteration, to determine for all time the rights and duties of his subjects. It is quite certain that Justinian never believed anything of the kind. His main purpose had been to set the law upon a solid foundation, and to cast it in a form which his successors would not lightly venture to alter; by the completeness of his work he hoped to endow his subjects with the inestimable blessing of a legal system pruned of all relics of antiquity, adequate in substance, and so judiciously arranged as to reduce the necessity of future change to a minimum. But within five years to have entirely recast a large portion of his own work might well arouse the suspicion, that the law had lost all its old stability; that the legislature had become too active; that as the first Code had been thrust aside to make room for a second, so the second would soon be swept away in favour of a third, and that in the confusion which such constant change could not fail to produce the many-sided security which all law is intended to guarantee would cease to exist. In his publication of the codex repetitae praelectionis Justinian deemed it necessary to deprecate all fear of such a tendency. He expressly recognised the probability, if not the necessity, of subsequent change, and enacted that constitutions issued after the publication of the Code should be formed into a distinct collection, under the title of 'novellae constitutiones': 'Si quid in posterum melius inveniatur et ad constitutionem necessario sit redigendum, hoc a nobis et constituatur, et in aliam congregationem referatur, quae novellarum nomine constitutionum significetur' (Just. in Cod. cordi nobis, § 4). The first of Justinian's Novels was enacted very shortly after the publication of the Code; their total number was at least 165, but they were never authoritatively collected and published in a connected form by their author. Though most of them relate to administrative business and ecclesiastical matters, there are some by which individual institutions of private law were entirely remodelled; the most important of these will be noticed in the commentary below.

The subsequent history of the Roman law in the West and East, the labour which the glossators and the modern civilians have spent upon its interpretation, and the acumen with which, especially in Germany, they have adapted it to modern social conditions, is too large a subject to be here entered into; all that can be done is very briefly to explain the form in which the Justinian legislation at present

exists in the countries where it possessed until very recently the force of law. Since Dionysius Gothofredus, in 1582, published it in its entirety with the name 'Corpus iuris civilis', this has been regarded as its proper technical title, especially in contradistinction to the 'Corpus iuris Canonici', or Canon law. As positive law, Justinian's three great compilations, the Institutes, the Digest, and the Code (along with the Novels, their natural appendix), form a system apart by itself, and as such they were viewed by the glossators, who divided them into five volumes, each distinguished by a separate name. The first three volumes comprised the Digest, and were known respectively as Digestum vetus, infortiatum, and novum. In the Digestum vetus was contained the Digest up to Book 24, Title 2; it thus ended with the title 'de divortiis et repudiis'. The 'infortiatum' began with the third title of Book 24, and ended with Book 38. The Digestum novum contained the remaining books (39–50) of the Digest of Justinian. The fourth volume of the glossators' corpus iuris comprised the Code, with the exception of Books 10-12, which were not discovered till later, and was entitled 'Codex repetitae praelectionis'; the fifth (called 'volumen parvum' or 'volumen' simply) contained the Institutes, and, eventually, also the three last books of the Code.

This division into five volumes is still found in the oldest editions of the Corpus iuris; but in the more modern ones, in which it is discarded, the Institutes are placed first, and are followed by the Digest, the Code, and the Novels in the order named. Many of these editions also contain certain extraneous fragments which properly do not belong to the work at all; among these are thirteen so-called 'edicts' of Justinian, which are in reality novels of merely local or particular import; fifteen constitutions of Justin the younger; several of the younger Tiberius; one hundred and eighteen novels of Leo; one of Zeno; a series of constitutions of various emperors, under the common titles imperatoriae constitutiones—canones sanctorum et venerandorum apostolorum—libri feudorum; some constitutions of Frederic II; two ordinances of Henry VII (extravagantes); and a 'liber de pace Constantiae'. Sometimes also there is to be found an attempt to reconstruct the Twelve Tables, the Praetorian Edict, and other celebrated monuments of the older ius civile.[1]

[1] It will have been observed that little or nothing has been said in these pages of the history of judicial institutions and civil procedure. This is briefly supplied in an excursus at the end of the volume.

INTRODUCTION TO BOOK I

The first two Titles of this book are merely introductory, and afford no clue to the principle on which it is intended to distribute the rules of the private code. Title 1 is derived in the main from the 'Institutions' of Ulpian; it contains definitions of Justice and Jurisprudence, determines the scope of the work as a treatise on private law, and draws the distinction between ius naturale, gentium, and civile, which has been adverted to in the general Introduction (pp. 28 sq., supr.). In the second Title ius naturale is defined after Ulpian, and then ius civile and ius gentium are distinguished in the words of Gaius, though, as has been pointed out elsewhere, the latter contrast is the true and important one, and in other parts of the work ius gentium and ius naturale are identified. The sources of the positive law of Rome are then specified and each briefly described.

In the opening words of the third Title we meet with the significant statement of the principle upon which the arrangement of the Institutes is to proceed. That principle, and, accordingly, that arrangement, is taken literally from Gaius, who, there is reason to believe, derived it from some earlier lawyer, and an exposition of its meaning will be as important for the work of the jurist as for that of the prince. 'The whole law by which we are governed relates either to persons, or to things, or to actions.' The division of the Institutes into these three departments is perfectly clear; the 'ius quod ad personas pertinet' occupies Bk. i, Title 3, to the end; the 'ius quod ad res' extends from the beginning of Bk. ii. to Bk. iv, Title 5; the remainder of Bk. iv. 'pertinet ad actiones.' In this particular point the Gaian distribution is more satisfactory, as it makes the break between res and actiones at the end of the third commentary, and devotes the whole of the fourth to the latter subject; in the Institutes the formal division of Books tends somewhat to obscure the material classification of the system. This, however, presents no obstacle to our comprehension of the system itself; but we are at once met by difficulties, and by great differences of opinion among the commentators, when we attempt to discover the meaning of the division into persons, things, and actions, and to ascertain its relation to other arrangements of private law, such as those of Savigny (General Introduction, pp. 76 sq., supr.) or of Austin and his school.

Our only business here is to ascertain what Gaius and Justinian

intended by ‘ ius quod ad personas pertinet ’. It seems clear that the only method by which this can be done is the analytical. Austin, it is to be regretted, set in England the example of pursuing a ‘ high *a priori* road ’ in connection with this matter ; the principal form of which is to adopt, as the leading division of law, that into ‘ the law of persons ’ and ‘ the law of things ’, though in a sense differing considerably from that in which it was understood by the Roman lawyers, and then either to find fault with the latter for not having meant the same as the writer, or to imply that they really meant the same thing, though owing to the weakness of their legal philosophy they did not adhere with any consistency to their own principle, and thereby committed most egregious faults of classification. Even if this be true, it is probably a worse fault still to take a classical expression (such as ‘ law of persons ’, which to its authors, we may surely believe, meant something perfectly precise), give it a new signification without frankly confessing that a liberty has been taken ; and then to irresistibly suggest that the two meanings are the same, if the authors of the expression really meant anything by it at all. To an English reader the greatest difficulty, in the effort to understand the arrangement of Gaius and Justinian, arises from Austin's perversion of the expressions ‘ law of persons ’ and ‘ law of things ’ for the purposes of his own system. If he had meant something totally different from them there would have been no confusion ; but the very fact that his meaning was somewhat the same, but at the same time somewhat different, has surrounded the matter with difficulties, to remove which an attempt will be made by pursuing a strictly analytical method, and by attending strictly to the language of the Roman lawyers themselves, without giving any fancy meaning to classical expressions whose actual signification can be ascertained with tolerable certainty.

What did the Romans mean by ‘ persona ’ ? It is clear there is some relation between persona and homo ; for the leading division of the ‘ ius quod ad personas pertinet ’ (i. 3. pr.) is that all men are either free or slaves. It is equally clear that they did not regard all men as persons ; it is not said all persons, but all *men*, are either free or slaves. Slaves, in fact, though men intellectually and morally, are ‘ things ’ in the eye of the law : it is only because their intellectual and moral nature sets them above the beasts that the law treats the two in some respects in different ways. It is true that now and then, though very rarely, the word ‘ persona ’ is applied to slaves (e. g. Bk. i. 8 pr.) ; but the uniform language

of legal authorities is the other way,[1] and there can be no doubt that it is only per incuriam that occasionally a writer using this or other terms (such as caput, status) implying personality includes the slave as well as free persons within his view. An essential element in the conception of ' persona ' is the capacity of acquiring or possessing legal rights, and, as will be seen, a slave could have no legal rights of any kind whatsoever.[2] In other words, a persona is a man regarded as invested with legal rights, or as capable of acquiring them, so that our attention is drawn away from the man to the rights, or to the capacity of having them in virtue of which he is a persona. The aggregate of a man's rights was called his status ; and accordingly the old civilians defined a persona as ' homo cum statu suo consideratus '. But what is it in virtue of which a man has legal rights ? In modern times it is usually in virtue of his submission, absolute or partial, to the sovereign of the country in which he happens to reside ; a man is usually capable of acquiring all the rights which are comprised under the private law of a state within whose limits he is domiciled. This view is essentially modern, and by realizing its strangeness to the Roman mind we shall have advanced some way towards understanding the ius personarum. To a man, as free, the Roman state conceded such rights only as were based on the ius gentium ; but the civis possessed far more rights, even in the field of private law, than the free peregrinus ; and many of these he enjoyed not through being a civis but because he was a member of a definite Roman family. The rights or status with which a man could be invested within the Roman state were thus always referable to either freedom, citizenship, or family connection ; and this way of looking at the matter became so habitual to the Roman, that of status in general he has little to say ; he always connects it with one of these three ' momenta ', and classifies a man's capacity of acquiring rights (or ' status ') according as he is merely free, is a citizen, or belongs to the agnatic circle of this or that Roman familia.

If then the ' law of persons ' is the law relating to human beings considered as invested with or as capable of acquiring rights, it is clearly much the same thing as the law relating to these three

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[1] ' Servi nec personam habentes,' Nov. Theod. xvii. 1. 2 ; *οἱ οἰκέται ἀπρόσωποι ὄντες*, Theophilus iii. 17, pr. ; ' servos, qui personam legibus non habebant.' Cassiodori Variar. vi. 8.

[2] ' Eigenthum, Forderungsrechte, Schulden haben können, das heisst für das Privatrecht, Person sein : ' Sohm, Institutionen, § 20.

'status' of libertas, civitas, and familia: it is 'the treatment of men in respect of their position in and in relation to the Roman state, because, according to that position, their capacity of right, and their capacity of performing legal acts, will differ'.[1] But it is obvious that much that can be said, in respect at any rate of one of these three topics, has no relation to private law; the latter has to point out distinctions between persons only so far as they are of importance to itself, and the distinction between civis and peregrinus is mainly publici iuris. Nor again does the 'ius quod ad personas pertinet' follow these differences into all their consequences. It points them out; but the effect of them, in the law of property and obligation, is left to be treated elsewhere, or, as is most commonly the case, is not treated at all.[2]

As to the status of liberty the non-free are not 'persons', and therefore it might seem that they should be passed over. But some mention is necessary (Title 3) of the modes in which men can become slaves; and, again, slaves are capable of becoming 'persons' by liberation, and therefore the ways in which this can take place are described (Title 5), and some account is given of the grounds on which manumission is prohibited by positive law (Titles 6 and 7) as also of restrictions imposed on the powers of masters over their slaves (Title 8). Moreover, the precise effect of manumission had depended on the form of the act, the age of the master and the slave, and the character of the latter; freedmen had thus not always been of the same kind, and means had been provided to enable them to rise from a lower grade in their class to a higher; but these distinctions, though referred to by Justinian, were abolished by him (Title 5), and the law was thereby much simplified, though the

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[1] Böcking, Institutionen, § 28.

[2] This appears to be the point in which the writers who have been referred to have gone astray. They would have been correct in defining the 'law of Persons' as 'the law of Unequals' or 'Abnormal law' if they had confined it to the mere description of differences between Persons, in virtue of which some were 'Unequal' or 'Abnormal'; but they have further made it follow up the consequences of such inequality in respect of property, contract, and dispositions generally. Thus in the 'law of Persons', Austin would not only describe infancy as a fact which modified a person's capacity of right and disposition, but he would proceed to enumerate the points of modification: e.g. an infant's incapacity to make a valid conveyance, give a valid receipt, or bind himself by contract. But, though Gaius and Justinian enumerate, among the differences between Persons, that of sui and alieni iuris, they speak of the filiusfamilias' proprietary capacity in Bk. ii, and of the effect of his contracts in Bks. iii and iv, under the ius quod ad res, or ad actiones pertinet.

division of freemen into freeborn (ingenui) and freedmen (libertini) still remained, and had important consequences in the law of succession, which are detailed in Book iii, Title 7.

The status of civitas, being historically of importance mainly in relation to public law, is not treated independently under the ius personarum by either Gaius or Justinian. It would not be difficult to explain this in the latter, in whose time peregrini were rare, and the ius civile had been so swallowed up in the ius gentium that the distinction between citizen and foreigner, in respect of private rights, was merely microscopic. But in the age of Gaius peregrini were plentiful, and the distinctive features of the civil law were still sufficiently prominent to place them at some disadvantage in respect of conveyance, contract, and civil procedure; the 'ius commercii' was still a privilege. We thus might have reasonably expected to find in Gaius the sentence 'rursus liberorum hominum alii cives sunt, alii peregrini'; but it is not there, and the omission, it must be allowed, is a grave flaw in the view which we have taken of the 'ius quod ad personas pertinet'. Still, it is equally to be accounted for on most other theories of the meaning of the phrase, and perhaps the best explanation which can be offered is that, as the difference between civis and peregrinus is merely that the former had, while the latter had not, the commercium and connubium, the distinction is a bare one, of which little can be said except in the 'ius quod ad res' or 'ad actiones pertinet', under the heads of property, contract, and procedure. It is true that in the time of Gaius there were certain intermediate classes, dediticii and Latini Iuniani, which might have been mentioned or described in this connection; but Gaius had already spoken of these, though perhaps less logically, under the head of manumission; so that to omit the distinction of civis and peregrinus was excusable, because it would have led to repetition and to difficulties of arrangement. And it may, lastly, be observed that the ius personarum was but little affected by the praetorian innovations; it was, in the main, pure ius civile; and if we may believe that Gaius' intention was under this head to describe the classes of persons who, iure civili, possessed a status, the peregrini did not form one of these classes, and therefore the bare distinction between them and cives did not require notice. 'Tuitione praetoris' they might possess rights; 'iure civili,' however, they were unimportant.

There remains the status familiae, and the discussion of this occupies the really greater portion of the first book of the Institutes.

It is introduced in connection with the distinction of persons into independent (sui iuris) and dependent (alieni iuris) (Title 8). Excluding the form of dependency found in slavery, which has been already treated, the only mode in which such subjection still existed in Justinian's time was the patria potestas (Title 9); and the various ways in which this may originate are described. These are (1) marriage, in connection with which a tolerably full account is indirectly given of the grades of consanguinity, apropos to the degrees within which it is forbidden to marry. As bearing closely on the law of intestate succession, the same subject is more explicitly treated in Bk. iii, Title 6. (2) Adoption, in its two forms adrogation and adoption sensu stricto (Title 11), and (3) legitimation (Title 10, § 13). Corresponding to these are described the modes in which patria potestas may be dissolved, and a person alieni may become sui iuris (Title 12), most of which may be grouped together under the three kinds of capitis deminutio, which is described in Title 16, rather out of its proper place. The guidance and control which children require in their tender years is naturally provided by the care of the father; but to meet the contingency of the latter's death while a child is still impubes, and especially to protect his proprietary interests, the Roman law established various forms of guardianship, to which the reader is introduced by a further distinction of persons sui iuris into those who have a tutor or curator, and those who act entirely for themselves (Title 13). The various forms of guardianship are treated in the succeeding titles, and the functions of a guardian, together with the limits of their necessary exercise, are touched on in Title 21. Title 22 relates to the modes in which guardianship is terminated, and Title 23 to curators, or persons appointed by the magistrate to manage the property of various classes of persons—minors over the age of puberty, lunatics, interdicted prodigals, and others who, from some mental or bodily infirmity, are incapable of adequately attending to their own affairs. Title 24 describes the circumstances under which guardians and curators have to give security for the due administration of their office, the nature of such security, and the liability of magistrates who neglect to exact it when they appoint these functionaries. Lastly, in Title 25, it is pointed out that the duties of guardians and curators are of a public nature, and cannot, as a general rule, be declined by any one called upon to undertake them; certain grounds of excuse however were recognised by law, and these are enumerated in detail.

The very exhaustive treatment which the status familiae, as contrasted with libertas and civitas, obtains in Gaius and the Institutes of Justinian has led Savigny to regard the 'ius quod ad personas pertinet' as merely family law, and to maintain that such was the meaning which those writers themselves attributed to it. He examines the view that the real subject of their first book is status, though not exactly in the sense in which we have understood the term; that is to say, he distinguishes status into natural and civil; by the latter he means the three great status to which alone we have given our attention; by the former he would express the differences which exist among persons as subjects of rights and duties on account of differences of age, sex, health, etc. This, of course, is a perversion of the strict Roman idea of the term status; and his rejection of this view is no reason for also rejecting that which we have adopted as the true one. To Hugo's theory, that the real subject of the 'ius quod ad personas pertinet' is 'capacity of right', or the three characters which correspond to the three forms of capitis deminutio (which coincides in the main with our own exposition) Savigny is more favourable, but he finds himself unable to accept it because it does not account for the facts, and therefore lacks the very essence of a tenable explanation: his main objections being that tutela has no relation to 'capacity of right' (Rechtsfähigkeit) but only to 'capacity for legal disposition' (Handlungsfähigkeit), and the omission of the important distinction between cives and peregrini, upon which something has been already said. If, says Savigny, we look more closely into the actual contents of the first book of the Institutes, we find that it corresponds very nearly to what he calls family law. It treats, in point of fact, of marriage, patria potestas, slavery, patronatus, guardianship (and, in Gaius, of manus and mancipium). On the other hand, the division into cives, Latini, and peregrini, important as it is in relation to capacity of right, is not to be found, because it belongs, in its real nature, to public law. The most serious objection, in Savigny's opinion, which can be urged against his own view, is the omission (in Gaius) of kinship, but this he does not consider fatal. It is remarkable that he did not see how slender was the coincidence between family law, as he conceived it, and the 'ius quod ad personas pertinet' of Gaius and Justinian. The former is in some ways of larger extent than the latter; thus it comprises the whole of the relations between husband and wife, and parent and child, though these belong to the latter only so far as they relate to patria potestas, and also the rules in respect of

patronatus and colonatus, which find no place in the 'ius quod ad personas pertinet' whatsoever. In some points, on the other hand, its content is less. The classification of 'persons' in Gaius and Justinian is based upon two great divisions, one of which is iuris gentium—all men are either free or slaves—while the other—all free men are either ingenui or libertini—is iuris civilis; the first of these, prominent as it is in Gaius and Justinian, has nothing to do with family law, because the relation between master and slave is one which belongs properly to the 'law of things', and which, as has been pointed out, is touched upon in the first book only by reason of the capacity of the slave, as distinct from other 'res', of becoming a 'persona' by manumission.

Perhaps one reason why there has been so much dispute as to the real signification of this division of law into personae, res, and actiones, is the supposition that it was a classification of great antiquity among the Romans themselves, a classification which they regarded as fundamental and not lightly to be departed from, and by understanding which therefore we shall obtain a deeper insight into their national legal habit, and comprehend more fully the leading distinctions of their system, and the interconnection of its parts. It may be true, as some authorities maintain,[1] that the arrangement was traditional among the Roman lawyers, and inherited from the old pontifical jurisprudence: but Sir H. Maine [2] is probably right in observing that there is no reason for supposing that they set any extraordinary value upon it. It was confined, he says, to their institutional treatises, or primers of law, the educational manuals placed in the hands of their beginners. We may add that Gaius' other well-known work, the 'res quotidianae', was composed on another plan, and that the order followed in the Institutes of Florentinus, who wrote after Gaius, was also quite different. The Twelve Tables again, and the Praetorian Edict as consolidated by Salvius Julianus, have no trace of the Gaian classification; the Gregorian and Hermogenian codes were arranged upon a different principle; so was the code of Theodosius II; so are the two larger works of Justinian himself. Upon any view, we cannot suppose that by the ordinary Roman jurist the division was regarded as much more important than other current contrasts which Savigny instances, such as those of vi, clam, and precario, the three forms of domestic

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[1] E.g. Karlowa, Röm. Rechtsgeschichte, i. p. 725.

[2] 'Ancient Ideas as to the Arrangement of Codes' in Early Law and Custom, p. 367.

dependence, potestas, manus, and mancipium, the three capitis deminutiones, and the three classes of cives, Latini, and peregrini. If there was any traditional view among the Romans as to the true mode of classifying their legal rules, Sir H. Maine has shown, in the chapter referred to, that it was probably the view which from the force of circumstances has prevailed in nearly every indigenous system of law under primitive conditions, and which assigns the first place in the code to judicature and rules of procedure, in the interstices of which the substantive law has in early times the appearance of being gradually secreted. The material law tends to become distributed into 'heads of dispute' in an order which seems to depend on their relative importance when it was finally determined, and in which, in more celebrated codes than one, a prominent place is given, in particular, to deposits and thefts.

In the foregoing remarks it has been assumed that Gaius and Justinian did actually intend to sketch in outline the main principles of the private law of Rome under the three heads of persons, things, and actions. Another view is that the division is a subjective one: that its true meaning is that one may regard any given rule of law at pleasure from any of three different points of view: either from that of persons as invested with rights: from that of things as their objects: or from that of the remedy by which, if infringed, the right is vindicated.[1] This explanation of Gaius' celebrated dictum seems to have originated with François Duarenus, who wrote about the middle of the sixteenth century: [2] but however attractive it may appear at first sight, it will not bear examination. Putting aside the objection that it credits Gaius with a refined analytical faculty of which little trace appears in his other writings, and which is more characteristic of modern works on abstract jurisprudence, this theory is sufficiently disproved by the facts obviously revealed in the books before us. As a matter of fact, Gaius does divide the law into three distinct heads or chapters. 'Prius videamus de personis,' he says

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[1] See e. g. Kuntze, Cursus des röm. Rechts, § 362.

[2] 'Haec verba (omne ius &c.) sic intellexerunt [quidam nostri temporis iuris professores] quasi nulla sit aptior nec commodior iuris tractandi docendique ratio, quam si de his tribus separatim disseratur. Verum longe aliter sensisse Gaium non dubito: nempe nullam partem iuris esse, nullum contractum, nullum negotium, nullam actionem, nullum iudicium, in quo tractando hi loci simul non incurrant, ut e.g. in tractatu de stipulationibus oritur imprimis quaestio de personis, quae stipulationem contrahere possunt: . . . de rebus quaeritur, sitne res sacra . . . . de actione quae ex contractu nascitur, sitne bonae fidei': Duarenus, disput. anniv. I. c. 55, cited in Böcking, Institutionen, § 28, note 2.

(i. 8 : Inst. i. 3. pr.) : then, having exhausted the topic of persons, 'modo videamus de rebus' (ii. 1 : Inst. ii. 1. pr.) : and finally 'superest ut de actionibus loquamur' (iv. 1 : Inst. iv. 6. pr.). To understand these phrases as meaning 'let us look at the law first from the point of view of persons' and so on requires the possession of an exegetical power apparently rare among modern exponents of the Roman Law.[1]

Between the private law of Rome as stated by Gaius, and as stated by Justinian, there is far more difference in the matter of personae and actiones than in the intermediate department, the 'ius quod ad res pertinet', except perhaps in such part of the latter as relates to inheritance or succession. The most important points of change in the subject now under our immediate consideration are briefly as follows : (1) The threefold division of libertini into cives, Latini, and dediticii, which was important when Gaius wrote, was practically obsolete in the time of Justinian, who formally abolished it ; this necessitated a change in the law of manumission, which was greatly simplified, the statutes which had introduced these distinctions being to that extent repealed, as also was the lex Fufia Caninia, limiting the number of slaves who could be manumitted by testament ; (2) of persons 'alieno iuri subiectae', exclusive of slaves, there had in Gaius' time been three classes, viz. those in paternal power, those in manu, and those in mancipio. In the Institutes patria potestas is still a living reality, but manus and mancipium have become obsolete ; hence a second simplification, the modes in which manus could arise, and some of the purposes for which it had been employed, being a somewhat complicated and difficult branch of law. (3) In Justinian legitimation of children not under patria potestas at birth is definitely treated as one of the modes in which this power may originate ; in Gaius' time this occurred only by the fact of a Latinus acquiring the civitas, and by his children born before this event being subjected to his potestas ; but in the later period there were no Latini ; and accordingly the long discussion in Gaius (i. 65–96) 'de statu liberorum', and on the modes in which a Latin

[1] Recently Duarenus' interpretation has been defended in a monograph by Dr. W. P. Emerton (London, 1888), who relies principally upon Gaius' use of 'vel' rather than 'aut' in drawing the distinction. But the writer has authority for saying that even in Cicero the usage of vel and aut is not so precise as Dr. Emerton assumes it to be in a much later writer : and it is possible that Gaius deliberately preferred the less dogmatic disjunctive because he felt that the division of the whole law into three masses could not possibly be so clean cut as might have been inferred if he had said aut . . . aut . . . aut.

could become a civis, has no counterpart in Justinian except the paragraph on legitimation in i. 10. 13; (4) with regard to adoption sensu stricto, Justinian completely altered its form, and also its effect unless the adopting person was a natural ascendant; with regard to 'adrogatio', the form had been changed between the two writers, it being now effected 'principali rescripto', not 'populi auctoritate', as in the time of Gaius; but no other change of any great importance had been made in this branch of law. (5) Justinian entirely changed the mode of emancipation (i. 12. 6) by substituting for the old fictitious sale a mere declaration by the parent before a magistrate. (6) In the department of guardianship the 'perpetua mulierum tutela', with which, though still existing in his day, Gaius (i. 190) had expressed his dissatisfaction, had altogether disappeared long before the compilation of the Corpus Iuris. The meaning of the expression 'fiduciaria tutela' has also been narrowed (see notes on Title 19), and the mode of magisterial appointment, in default of a testamentary or agnatic guardian, is different from what it was in the time of the earlier writer. On the subject of curators Justinian is far fuller than the latter, and to his last two Titles (de excusationibus —de suspectis tutoribus et curatoribus) there is no corresponding matter in Gaius at all. This is probably to be explained by the fact that the conception of tutela had changed between the two writers, or at any rate had in the later period come to be regarded far more as a 'publicum munus', from which exemption could be claimed only on very sufficient grounds, than in the age even of the Antonines.

IN NOMINE DOMINI NOSTRI IESU CHRISTI

IMPERATOR CAESAR FLAVIUS IUSTINIANUS ALAMANNICUS GOTHICUS FRANCICUS GERMANICUS ANTICUS ALANICUS VANDALICUS AFRICANUS PIUS FELIX INCLITUS VICTOR AC TRIUMPHATOR SEMPER AUGUSTUS CUPIDAE LEGUM IUVENTUTI.

Imperatoriam maiestatem non solum armis decoratam, sed etiam legibus oportet esse armatam, ut utrumque tempus et bellorum et pacis recte possit gubernari et princeps Romanus victor existat non solum in hostilibus proeliis, sed etiam per legitimos tramites calumniantium iniquitates expellens, et fiat tam iuris religiosissimus quam victis hostibus triumphator.

Quorum utramque viam cum summis vigiliis et summa 1
providentia adnuente deo perfecimus. et bellicos quidem sudores nostros barbaricae gentes sub iuga nostra deductae cognoscunt et tam Africa quam aliae innumerosae provinciae post tanta temporum spatia nostris victoriis a caelesti numine praestitis iterum dicioni Romanae nostroque additae imperio protestantur. omnes vero populi legibus iam a nobis vel
promulgatis vel compositis reguntur. Et cum sacratissimas 2
constitutiones antea confusas in luculentam ereximus consonantiam, tunc nostram extendimus curam et ad immensa prudentiae veteris volumina, et opus desperatum quasi per medium profundum euntes caelesti favore iam adimplevimus.
Cumque hoc deo propitio peractum est, Triboniano viro 3
magnifico magistro et exquaestore sacri palatii nostri nec non Theophilo et Dorotheo viris illustribus antecessoribus, quorum omnium sollertiam et legum scientiam et circa nostras iussiones fidem iam ex multis rerum argumentis accepimus, convocatis specialiter mandavimus, ut nostra auctoritate nostrisque suasionibus componant institutiones: ut liceat vobis prima legum cunabula non ab antiquis fabulis discere,

sed ab imperiali splendore appetere et tam aures quam animae vestrae nihil inutile nihilque perperam positum, sed quod in ipsis rerum optinet argumentis accipiant: et quod in priore tempore vix post quadriennium prioribus contingebat, ut tunc constitutiones imperatorias legerent, hoc vos a primordio ingrediamini digni tanto honore tantaque reperti felicitate, ut et initium vobis et finis legum eruditionis a voce
4 principali procedat. Igitur post libros quinquaginta digestorum seu pandectarum, in quos omne ius antiquum collatum est (quos per eundem virum excelsum Tribonianum nec non ceteros viros illustres et facundissimos confecimus), in hos quattuor libros easdem institutiones partiri iussimus, ut sint
5 totius legitimae scientiae prima elementa. Quibus breviter expositum est et quod antea optinebat et quod postea desuetudine inumbratum ab imperiali remedio illuminatum est.
6 Quas ex omnibus antiquorum institutionibus et praecipue ex commentariis Gaii nostri tam institutionum quam rerum cottidianarum aliisque multis commentariis compositas cum tres praedicti viri prudentes nobis optulerunt, et legimus et cognovimus et plenissimum nostrarum constitutionum robur eis accommodavimus.

7 Summa itaque ope et alacri studio has leges nostras accipite et vosmet ipsos sic eruditos ostendite, ut spes vos pulcherrima foveat toto legitimo opere perfecto posse etiam nostram rem publicam in partibus eius vobis credendis gubernare.

Data undecimo kalendas Decembres Constantinopoli domino nostro Iustiniano perpetuo Augusto tertium consule.

DOMINI NOSTRI IUSTINIANI PERPETUO AUGUSTI

INSTITUTIONUM SIVE ELEMENTORUM

COMPOSITORUM PER TRIBONIANUM VIRUM EXCELSUM IURISQUE DOCTISSIMUM MAGISTRUM ET EXQUAESTORE SACRI PALATII ET THEOPHILUM VIRUM MAGNIFICUM IURIS PERITUM ET ANTECESSOREM HUIUS ALMAE URBIS ET DOROTHEUM VIRUM MAGNIFICUM QUAESTORIUM IURIS PERITUM ET ANTECESSOREM BERYTENSIUM INCLITAE CIVITATIS

LIBER PRIMUS

I

DE IUSTITIA ET IURE

Iustitia est constans et perpetua voluntas ius suum cuique
tribuens. Iuris prudentia est divinarum atque humanarum 1
rerum notitia, iusti atque iniusti scientia.

His generaliter cognitis et incipientibus nobis exponere iura 2
populi Romani ita maxime videntur posse tradi commodissime, si primo levi ac simplici, post deinde diligentissima atque exactissima interpretatione singula tradantur. alioquin si statim ab initio rudem adhuc et infirmum animum studiosi multitudine ac varietate rerum oneraverimus, duorum alterum aut desertorem studiorum efficiemus aut cum magno labore eius, saepe etiam cum diffidentia, quae plerumque iuvenes avertit, serius ad id perducemus, ad quod leniore via ductus

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Tit. I. On these definitions of justice and jurisprudence see General Introduction, p. 62, supr. The first is as old as Simonides (*τὰ ὀφειλόμενα ἑκάστῳ ἀποδιδόναι δίκαιόν ἐστι*, cited in Plato, Rep. i.): for close parallels cf. Cic. de Fin. v. 23, de Off. i. 2, iii. 2.

sine magno labore et sine ulla diffidentia maturius perduci potuisset.

3 Iuris praecepta sunt haec: honeste vivere, alterum non

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§ 3. As a term of Roman law, ius has various significations, viz. (i.) objectively, *law*; and this with several shades of meaning: (*a*) the whole body of law, or large divisions of it (e.g. ius quo urbs Roma utitur: ius civile, gentium, honorarium, publicum, privatum; (*b*) single rules of law (e.g. 'iura condere' Bk. i. 2. 8, 'ius senatus consulti inducere' Dig. 38. 4. 3. 2); (*c*) law established or recognised by judicial decision (e.g. 'ius fieri ex sententia iudicis' Dig. 5. 2. 17. 1, 'praetor ius reddere dicitur, etiam cum inique decernit' Dig. 1. 1. 11); (*d*) law as a subject of study, = jurisprudence (e.g. Dig. 1. 1 pr. 'ius est ars boni et aequi', ib. 1. 22. 1 'iuri operam daturus, studiosus iuris'). (ii.) Subjectively, a *right* conferred by ius in sense (i.): e.g. pr. supr.: so frequently iura praediorum = servitutes; or a collection of such rights, e.g. 'succedere in ius demortui'; Bk. ii. 20. 11 'legatarii et fidei commissarii non iuris successores sunt'; (iii.) the place in which the praetor sat to administer justice: 'alia significatione ius dicitur locus, in quo ius redditur: quem locum determinare hoc modo possumus: ubicunque praetor salva maiestate imperii sui salvoque maiorum more ius dicere constituit, is locus recte ius appellatur' Dig. 1. 1. 11. In this sense, under the formulary system of procedure, ius was usually employed to denote the court of the praetor, as distinguished from the proceedings before the iudex whom he appointed to hear and decide the case, which were called iudicium: e.g. the common expressions in ius vocare, in iure cedere, in iure interrogari, confiteri, etc.; (iv.) judicial proceedings themselves, e.g. 'dies in quibus debent iura differri' Cod. 3. 12. 73; (v.) = potestas, as in the common phrases persona sui iuris, persona alieno iuri subiecta, e.g. Bk. i. 8 pr.; Gaius i. 48. 49; so Dig. 36. 2. 14. 3 'in ius alicuius pervenire'; (vi.) = status: 'emancipari a patre adoptivo, atque ita pristinum ius recuperare' Dig. 1. 7. 33. (vii.) The jural nature of a person or thing, e. g. 'ius actoris deterius facere' Dig. 2. 9. 1. 1, 'ius fundi deterius factum' Dig. 50. 16. 126, 'domum cum iure suo omni legare' Dig. 33. 10. 8; (viii.) relation, e.g. 'adoptio non ius sanguinis, sed ius agnationis affert' Dig. 1. 7. 23, 'nonnunquam ius pro necessitudine accipimus, veluti est ius cognationis vel affinitatis' Dig. 1. 1. 12.

In the expression 'iuris praecepta', ius seems hardly to bear any of these meanings, for the precept 'honeste vivere' is rather an ethical principle than a rule of positive law; at least men often practise what cannot be termed an honest calling without bringing themselves within reach of the law. Perhaps it is better to regard the three iuris praecepta not as legal rules themselves, but as the basis of a classification of legal rules according to the various departments of the whole duty of man, self-regarding and extra-regarding (Savigny, System i. 409). It may be, however, that Ulpian, from whom pr. and §§ 1 and 3 of this Title are taken, and in whose 'Regulae', Bk. i, they stand in close connection, meant

laedere, suum cuique tribuere. Huius studii duae sunt 4
positiones, publicum et privatum. publicum ius est, quod ad statum rei Romanae spectat, privatum, quod ad singulorum utilitatem pertinet. dicendum est igitur de iure privato, quod est tripertitum: collectum est enim ex naturalibus praeceptis aut gentium aut civilibus.

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§ 3 to be an expansion or explanation of pr.; by enouncing, as the first precept of the law, a rule relating to oneself and not to other persons, he intended to say, that although justice is what he defines it to be in pr., it is not yet enough to injure no one, and to give every man his due, in order to save oneself from collision with the law: the law also punishes any unworthy conduct by which one's own personality is degraded.

§ 4. Public law 'in sacris, in sacerdotibus, in magistratibus consistit' Dig. 1. 1. 1. 2. In the Roman view it comprised two parts: (1) constitutional law in its widest sense, i.e. the law which determines in whom the sovereign power shall reside, how it shall be exercised, and to what checks the persons among whom it may be distributed shall be subject. It thus embraces all administrative law, which indeed under the later Empire formed its largest portion; see the account of Theodosius' Code in the General Introduction, p. 71 supr. Another important portion of it was the ius sacrum, even after Theodosius II had made Christianity the national religion. (2) Criminal law: privata delicta (torts) were distinguished from publica delicta or crimes: 'publica crimina, quorum delatio omnibus conceditur' Cod. 9. 9. 30 pr., see Bk. iv. 18. 1 inf.

It is of course impossible to draw a perfectly hard and fast line between public and private law, and this was for historical reasons particularly true of Rome (General Introd. p. 16 sq., supr.); many institutions are from one point of view regarded as publici, from another as privati iuris; thus tutela, though discussed in the Institutes, was a munus publicum, and so in Dig. 28. 1. 3, it is said 'testamenti factio publici iuris est'. Civil procedure, from the prominence with which it is treated in Bk. iv, and also by Gaius, was apparently considered a part of private law; but by many this is regarded as arbitrary and unjustifiable, on the ground that rules of procedure are properly rules determining how the powers of certain officers (magistrates and judges) shall be exercised.

The division of the whole body of law observed within the limits of any given state into public and private, though as old as Aristotle (Rhet. i. 13. 3), and adopted by the modern civilians no less than by the Roman jurists, is severely criticised and rejected by Austin (Jurisprudence, lect. 44), who would make the greater part of public law so called part of the law of persons. This is scientifically correct if we take law of persons, as he does, in a sense very different from that given to it by its originators: but this seems to be just one of those cases in which strict scientific accuracy may be sacrificed to considerations of convenience.

II

DE IURE NATURALI ET GENTIUM ET CIVILI

Ius naturale est, quod natura omnia animalia docuit. nam ius istud non humani generis proprium est, sed omnium animalium, quae in caelo, quae in terra, quae in mari nascuntur. hinc descendit maris atque feminae coniugatio, quam nos matrimonium appellamus, hinc liberorum procreatio et educatio : videmus etenim cetera quoque animalia istius iuris
1 peritia censeri. Ius autem civile vel gentium ita dividitur :
G. i. 1 **omnes populi, qui legibus et moribus reguntur, partim suo proprio, partim communi omnium hominum iure utuntur : nam quod quisque populus ipse sibi ius constituit, id ipsius proprium** civitatis **est vocaturque ius civile, quasi ius proprium** ipsius **civitatis : quod vero naturalis ratio inter omnes homines constituit, id apud omnes populos peraeque custoditur vocaturque ius gentium, quasi quo iure omnes gentes utuntur.** et **populus itaque Romanus partim suo proprio, partim communi omnium hominum iure utitur. quae singula qualia sunt, suis**

At the close of this paragraph naturalia praecepta are distinguished from praecepta gentium and praecepta civilia : so in the next Title ius naturale is distinguished from both ius gentium and ius civile. This, however, is (with two exceptions, Bk. i. 2. 2, ib. 5 pr.) the only passage in the Institutes in which ius gentium is opposed to ius naturale, and it leaves no mark on the system : in all other places the two expressions are used as synonymous, and in Bk. ii. 1. 11 they are expressly identified, '. . . iure naturali, quod, sicut diximus, appellatur ius gentium.' The explanation of the seeming anomaly is that in Tit. 1. 4, and Tit. 2. 1. Justinian is quoting verbatim from the Institutes of Ulpian, who is the only leading jurist who makes anything of the distinction, while Tit. 2. 1 is taken from Gaius. For the history and meaning of the terms see General Introd. pp. 29 sq., supr.

Tit. II. The idea of ius naturale as distinct from ius gentium is derived from notions of a prehistoric epoch in which men were, in point of social development, hardly distinguishable from other animals. Savigny (Syst. i. p. 415) attempts to justify Ulpian's attribution of a jural character to natural instincts by drawing a distinction between the matter and the form in every legal relation. The matter here is the sexual relation, or the relation between parent and offspring, the form is given to it, among men, by positive law ; and what Ulpian ascribes to the animal world is not the form (law itself), but the matter of law. But Savigny admits not only that the three-

locis proponemus. Sed ius quidem civile ex unaquaque civitate appellatur, veluti Atheniensium: nam si quis velit Solonis vel Draconis leges appellare ius civile Atheniensium, non erraverit. sic enim et ius, quo populus Romanus utitur, ius civile Romanorum appellamus: vel ius Quiritium, quo Quirites utuntur: Romani enim a Quirino Quirites appellantur. sed quotiens non addimus, cuius sit civitatis, nostrum ius significamus: sicuti cum poetam dicimus nec addimus nomen, subauditur apud Graecos egregius Homerus, apud nos Vergilius. ius autem gentium omni humano generi commune est. nam usu exigente et humanis necessitatibus gentes humanae quaedam sibi constituerunt: bella etenim orta sunt et captivitates secutae et servitutes, quae sunt iuri naturali contrariae. iure enim naturali ab initio omnes homines liberi nascebantur. ex hoc iure gentium et omnes paene contractus introducti sunt, ut emptio venditio, locatio conductio, societas, depositum, mutuum et alii innumerabiles. 2

Constat autem ius nostrum aut ex scripto aut ex non scripto, ut apud Graecos: *τῶν νόμων οἱ μὲν ἔγγραφοι, οἱ δὲ ἄγραφοι.* Scriptum ius est lex, plebiscita, senatus consulta, principum placita, magistratuum edicta, responsa prudentium. 3

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fold division of law is unsuitable for purposes of law, but that the twofold division (ius gentium and naturale being identified) is far the more common, being adopted by Paulus, Marcian, Florentinus, and Licinius Rufus, as well as by Gaius, and traceable in every department of the system. Thus the conditions of marriage rest on either civilis or naturalis ratio, Bk. i. 10 pr. inf.: there are, even in Ulpian (Dig. 1. 7. 17. 1), two kinds of relationship, civilis and naturalis cognatio; rights both in rem and in personam could be acquired either civiliter or naturaliter; and Ulpian himself distinguishes possession (Dig. 10. 4. 3. 15) and obligation (Dig. 44. 7. 14) into civil and natural.

§ **2**. Slavery is here said to be naturali iuri contraria, and so in Tit. 5 pr. inf. Justinian (following Ulpian, Inst. 1. 1) says that by natural law all men are born free, slavery having been introduced iure gentium. Similarly Florentinus says 'servitus est constitutio iuris gentium, qua quis dominio alieno contra naturam subiicitur' Dig. 1. 5. 4. 1; cf. Gaius 1. 52, Tit. 8. 1 inf., and Aristotle, Pol. i. 2 *ὁ γὰρ νόμος ὁμολογία τις ἐστίν, ἐν ᾧ τὰ κατὰ πόλεμον κρατούμενα τῶν κρατούντων εἶναί φασιν.*

§ **3**. The terms ius scriptum and non scriptum were, to the Roman mind, free from all modern ambiguities as to law written and unwritten (Austin, lect. 29); they were taken quite literally, the former indicating law which in its very origin was embodied in writing; thus, as is said in

G. i. 2. 4 **Lex est, quod populus** Romanus senatore magistratu interrogante, veluti consule, constituebat. **plebiscitum est, quod plebs** plebeio magistratu interrogante, veluti tribuno, constituebat. **plebs autem a populo eo** differt, quo species a genere: nam **appellatione populi universi cives significantur connumeratis etiam patriciis** et senatoribus: **plebis autem appellatione sine patriciis** et senatoribus **ceteri cives significantur.** sed et plebiscita **lege Hortensia** lata non minus
G. i. 4. 5 valere quam leges coeperunt. **Senatus consultum est, quod senatus iubet atque constituit.** nam cum auctus est populus Romanus in eum modum, ut difficile sit in unum eum convocare legis sanciendae causa, aequum visum est senatum
6 vice populi consuli. Sed et quod principi placuit, legis habet vigorem, cum lege regia, quae de imperio eius lata est, populus

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this section, the praetor's edict was ius scriptum, even when based, as it not unfrequently was, on immemorial custom.

§ 4. For an explanation of the terms lex, a law passed in the comitia centuriata, and plebiscitum, see General Introduction, pp. 20, 21, 25 supr. After the lex Hortensia, however, plebiscita were frequently called leges, e.g. Dig. 9. 2. 1. 1 ('lex Aquilia plebiscitum est, quum eam Aquilius tribunus a plebe rogaverit'). Later still senatusconsulta were called leges (e.g. SC. Macedonianum in Dig. 14. 6. 9. 4, and cf. Gaius i. 85), and finally the term was applied to imperial constitutions: 'quodcunque imperator statuit, legem esse constat.' The words 'et senatoribus' were apparently inserted in those of Gaius (i. 3) by Justinian, for the earlier writer must have remembered that plebeians elected to the senate remained plebeians still, while in the latter's time the plebs was probably conceived as a rabble, and the patriciate was a dignity higher even than that of senator, Cod. 12. 3. 3 pr.

§ 5. For senatusconsulta see General Introd. pp. 47 sq., supr.

§ 6. For the lex regia see General Introd. p. 48 supr.; cf. Cic. de Republ. ii. 13, 17, 18, and 20: Tacitus, Hist. i. 47, ii. 55, iv. 3, 6.

The general term employed to denote law made by the emperor in virtue of the lex regia is constitutiones; he is not said iubere, like the populus and plebs (Gaius i. 3), but decernere, censere, constituere, like other magistrates; and in Dig. 50. 16. 120 even prudentes are said 'iura constituere'. At first such ordinances seem to have been regarded as differing from the edicta of the old republican magistrates only in their frequency and in the binding force which they possessed for all other public officers; and it has been already observed that under the first emperors the form of legislation by the comitia was retained: that leges were gradually superseded by senatusconsulta; and that finally, about the end of the second century, the princeps cast off the form of

ci et in eum omne suum imperium et potestatem concessit. quodcumque igitur imperator per epistulam constituit vel cognoscens decrevit vel edicto praecepit, legem esse constat: Cf. G. i. 5. haec sunt, quae constitutiones appellantur. plane ex his

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expressing his orders as the orders of the senate, and boldly carried on the work of direct legislation in his own name only.

Under this general term 'constitutio' are comprised many varieties of enactments. (1) When the emperor laid before the senate a 'projet de loi', it was usual for him to introduce it by an oratio (e. g. Oratio Pertinacis, Bk. ii. 17. 7 inf.; cf. Dig. 2. 12. 1. 2; 2. 15. 8 pr.; 5. 3. 22); these orationes were regarded as law apart from the senatusconsulta themselves, and were cited as such, often in preference to the latter, by the jurists, and after Constantine an oratio was known as an imperial ordinance of which notice had been given to the senate. (2) Edicta, issued by the emperor in virtue of his authority as supreme magistrate. Gaius mentions an edict of Trajan in iii. 172, and one of Hadrian in i. 55 and 93; one of Marcus Aurelius is referred to in Bk. ii. 6. 14 inf. When the emperor had become the sole legislative power, constitutions which, as containing a general rule of law, corresponded to the leges and plebiscita of the Republic, were called edicta or edictales constitutiones; they were addressed either to the subjects of the empire at large (ad populum, ad omnes populos), to the senate, or to an imperial officer, the praefectus urbi or praetorio, for promulgation. (3) Mandata, by which the emperor delegated his jurisdiction to other magistrates (legati, and the two praefects just mentioned), and which may be regarded as laws proper only so far as they contained general instructions as to the exercise of the delegated authority; that they are not enumerated among the kinds of constitutions by Ulpian (Dig. 1. 4. 1. 1), from whom this passage of the Institutes is taken, or, in Gaius i. 5, is probably because the great majority of them related to matters not of private but of public law. (4) Decreta and rescripta, which up to the time of Constantine were by far the commonest kinds of constitutio, and which necessitate a brief notice of the judicial functions exercised by the princeps.

In the first place he frequently exercised the functions which had under the Republic been discharged by the praetor: Augustus 'assidue ius dixit' Sueton. Octav. 33; and these judicial functions were, according to the usual distinction, partly ordinary, partly extraordinary; he either appointed a iudex to hear and decide the case, or he retained the cognisance of it to himself, and decided it by a decretum. Secondly, through his tribunicia potestas he acquired and exercised an important appellate jurisdiction, in virtue of which he assumed to modify and even reverse the sentence of a judge, exactly as the republican tribuni plebis had been entitled to veto the act of other magistrates. Out of this grew the practice of referring legal points in the first instance to the emperor by petition, or to be considered by him in private, and not, as had been usual with the praetor, in the public forum. These matters he sometimes decided once

quaedam sunt personales, quae nec ad exemplum trahuntur, quoniam non hoc princeps vult: nam quod alicui ob merita indulsit, vel si cui poenam irrogavit, vel si cui sine exemplo subvenit, personam non egreditur. aliae autem, cum gene-

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for all by a decretum; but far oftener he replied by rescriptum, which was a provisional decision of the *legal* point at issue, leaving the facts alleged by the petitioner to be inquired into, and a final settlement made, by another magistrate or an ordinary iudex. It also became usual for magistrates, and especially the provincial praesides, to refer difficult cases of law, when in doubt, to the emperor for advice, and the replies to such consultations were also called rescripta. Rescripta were technically of two kinds: epistolae (e.g. Bk. iii. 20. 4 inf.), independent replies to questions referred to the imperial judgment, which was usually the form employed in answering a magistrate; and subscriptiones, brief opinions on cases submitted by petition, and written at the foot of the petition itself, this being the common form in answering private persons (e.g. subscriptio Hadriani, Bk. ii. 12 pr. inf.).

The precise authority of these decreta and rescripta has been much disputed. Savigny (Syst. i. pp. 125–141) contends that their sole binding force was for the particular case for which they were issued: they might be cited as authorities for other similar cases, but the judge was under no strict obligation to apply them in the way in which he was bound to apply and follow leges proper. If this is true, then lex in Ulpian's words (' quodcumque ergo imperator vel per epistulam constituit, vel cognoscens decrevit, vel edicto praecepit legem esse constat ') must have a very different sense from that which it usually bears, and the words in the text (' plane ex his [constitutionibus] quaedam sunt personales, quae nec ad exemplum trahuntur ') are still more against Savigny; for upon his view all decreta and rescripta are personales constitutiones, and yet it is quite clear from the paragraph immediately succeeding (' nam quod alicui ob merita indulsit ', etc., in this section) that Ulpian did not conceive them as such. Even stronger arguments against him are to be found in our knowledge that the Emperor Macrinus (A.D. 218) meditated the repeal of all his predecessors' rescripta, on the ground that it was intolerable that the capricious judgments of such tyrants as Commodus and Caracalla should be regarded as law; and that Arcadius and Honorius, in A.D. 398, forbade, in future, the application of rescripta, and doubtless of decreta as well, to cases other than those which they were immediately designed to determine; the enactment was made even more stringent by Theodosius and Valentinian. This rule was reversed by Justinian, who bears strong evidence against Savigny: ' sciant hanc esse legem non solum illi causae, pro qua producta est, sed et omnibus similibus . . . cum et veteris iuris conditores constitutiones, quae ex imperiali decreto processerunt, legis vim obtinere aperte dilucideque definiant ' Cod. 1. 14. 12 pr.; cf. Girard, 4th ed. pp. 60, 61.

It appears then more probable that decreta and rescripta possessed

rales sunt, omnes procul dubio tenent. Praetorum quoque 7
edicta non modicam iuris optinent auctoritatem. haec etiam ius honorarium solemus appellare, quod qui honores gerunt, id est magistratus, auctoritatem huic iuri dederunt. proponebant et aediles curules edictum de quibusdam casibus, quod

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the force of general law in reference to later cases resembling those for whose decision they were originally issued, provided that the intention of their respective issuers had been that they should enounce a legal rule, and not merely determine a specific case. Despite the evidence of St. Augustine (' ut etiam idiotae intelligant, quid specialiter, quid generaliter in quocunque praecepto imperiali sit constitutum ' de Doctr. Christ. iii. 34), the question whether a particular rescript was intended by its author to be merely personale (e.g. Bk. ii. 19. 6 inf.), or to state a principle of law, became a frequent subject of juristic disputation. Such as were undoubtedly of the latter character were called generalia rescripta (e.g. Dig. 35. 2. 89. 1 ' divi Severus et Antoninus generaliter rescripserunt Bononio Maximo ', Dig. 11. 4. 1. 2 ' est etiam generalis epistola divorum Marci et Commodi '). But rescripts were also called ' generalia ' when it was held that the rule which they contained might be extended to cases even remotely resembling the one originally decided ; e.g. the rule ignorantia iuris non excusat is derived in its general form by Papinian from a rescript of Severus and Antoninus, Dig. 22. 6. 9. 5. There is reason to believe that decreta and rescripta, which their authors intended to be of general application, were fixed up in some public place, like the Praetor's Edict : see Girard, Textes (2nd ed.), p. 164.

From the time of Constantine onward, and in the Eastern Empire, a particular kind of rescripta acquired the name of ' pragmatic sanctions '. These are rescripta in answer to petitions, drawn up in a peculiar and solemn form, and distinguished from other rescripts by being more highly taxed : Zeno restricted their use to petitions preferred by corporations.

In framing constitutions (to whichever of these species they belonged) the emperor was assisted by a council, called in the later period consistorium (Cod. 1. 14. 8), to which the praefecti urbi and praetorio and the most celebrated jurists belonged, and which gradually assumed the character of a general council of state ; it was regularly consulted by the emperor in the exercise of his supreme appellate jurisdiction, and the chamber in which such consultations were held was as early as M. Aurelius called auditorium principis. It was mainly in this way that the jurists acquired their knowledge of the imperial constitutions, of which some of them (e.g. Papirius Justus and Paulus) even made systematic collections.

§ 7. For the praetor's edict, and its relation to the ius gentium, see General Introd. pp. 29 sq., supr. The place of the edict of the curule aedile in private law is due to his official control of the markets, streets, etc. (General Introduction, p. 22 supr.). The first title of Dig. 21. is ' de aedilicio edicto ', and out of his jurisdiction in such matters arose certain

G. i. 7. 8 edictum iuris honorarii portio est. **Responsa prudentium sunt sententiae et opiniones eorum, quibus permissum** erat **iura condere.** nam antiquitus institutum erat, ut essent qui iura publice interpretarentur, quibus a Caesare ius respondendi datum est, qui iuris consulti appellabantur. **quorum omnium sententiae** et opiniones eam auctoritatem tenent, ut iudici recedere a responso eorum non liceat, ut est con-
9 stitutum. Ex non scripto ius venit, quod usus comprobavit.

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actions of Roman law (actio redhibitoria and actio aestimatoria seu quanti minoris, note on Bk. iii. 23. 3 inf.; cf. Bk. iv. 9. 1 inf.) imposing an obligation of warranty on vendors, at first in market overt, and then in all sales. Stipulationes aediliciae, analogous to the praetorian stipulations mentioned in Bk. iii. 18. 2 inf., are spoken of in Dig. 45. 1. 5 pr.

§ 8. For the responsa prudentium see General Introd. p. 57 supr., and for the difficulties of this particular passage, p. 60. Theophilus distinguishes between sententiae and opiniones thus: sententia . . . *ἀναμφίβολος ἀπόκρισις*, opinio *μετὰ ἐνδοιασμοῦ προσφερομένη ἀπόκρισις*.

§ 9. To the ius non scriptum belongs (besides the mores maiorum, the national customary law of Rome) the whole of the ius gentium originally, and subsequently such parts of it as did not become scriptum by being worked into the edict or other legislation.

Mos is to be distinguished from consuetudo (in so far as the latter term has a jural meaning), for it includes 'positive morality' no less than rules strictly legal: 'morem esse communem consensum omnium simul habitantium, qui inveteratus consuetudinem facit' Servius ad Verg. Aen. vii. 601, 'morem praecedere, sequi consuetudinem . . . perseverantium consuetudinis . . . cultus moris, quod est consuetudo' Macrob. Saturn. iii. 8. It has been stated in the General Introduction (p. 2 supr.) that originally the Roman law existed only in the form of custom. Legislation, direct and indirect, was of later introduction, but steadily tended to absorb customary law. The Twelve Tables were in the main a statutory re-enactment of the customs then recognised as binding: others were taken up into subsequent statutes, the Edict, and the writings of the iuris auctores, until in the time of Gaius, and still more of course in the period immediately preceding Justinian, there were but few general customs possessing legal validity as such, though many statutes and quasi-statutory rules could be traced in their origin to this source. This is the case with acquisition by conventio in manum (Gaius iii. 82) and by adrogation (ib. and Bk. iii. 10 pr. inf.), and with substitutio pupillaris (Bk. ii. 16 pr. inf.). The validity of customary law is stated emphatically not only here and in Bk. iv. 17 pr., but also in the Digest and Code: 'de quibus causis scriptis legibus non utimur, id custodiri oportet, quod moribus et consuetudine inductum est' Dig. 1. 4. 32 pr., 'inveterata consuetudo pro lege non immerito custoditur' ib., 'quae sunt moris et consuetudinis, in bonae fidei iudiciis debent venire' Dig. 21. 1. 31. 20, 'consuetudinis ususque

nam diuturni mores consensu utentium comprobati legem

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longaevi non vilis auctoritas est' Cod. 8. 52. 2; cf. the strong expressions of Aristotle in Pol. ii. 5 ὁ γὰρ νόμος ἰσχὺν οὐδεμίαν ἔχει πρὸς τὸ πείθεσθαι, πλὴν παρὰ τὸ ἔθος, ib. iii. 11 κυριώτεροι τῶν κατὰ γράμματα νόμων οἱ κατὰ τὰ ἔθη εἰσίν.

Few subjects have been so much disputed, and we may perhaps say misunderstood, by modern jurists, as the nature of customary law, its validity, and the relation (if the two terms are to be distinguished) between customary law and custom. That custom ever has any force as positive law is vehemently denied by Austin; until it receives the impress of the judge or legislator, it is only positive morality (Jurisprudence, p. 37); when it has received that impress it ceases to be custom and becomes positive law, though the name 'customary law' for it is convenient as perhaps suggesting the ground on which it has been invested with a legal sanction (ib. p. 204). The error of this view (which Austin himself admits runs counter to all the utterances of the Roman jurists) has been shown by Sir H. Maine (Early History of Institutions, lectures 12 and 13) to have originated in Austin's habit of basing his generalisations on observations only of Western communities, in which the engrossing power of direct legislation had been kept in men's memories by traditions of the Roman Empire. As to the way in which custom, as law (i.e. before it is embodied in legislation direct or indirect), is generated, and how it acquires its binding force, there have also been great differences of opinion. The question is really as to the relation between the usage, and the consciousness that that usage is a right one, and one which (legally) ought to be followed, or as to the relation between the usage and the binding rule, or, as it is sometimes shortly though unhappily expressed, between custom and law. The earlier view was that customary law is law generated by custom, diuturnus usus. In this or that relation of life, people follow a uniform practice, and this practice, in virtue of its uniformity, is called a custom; before long it gains so strong a hold upon the mind as to be followed as law, and in fact to become law, which the Courts (the protection of security, and attainment of fixity of relations, being part of their business) will enforce. Custom is thus said to be a source of law, and law proper, in the history of nearly every nation, to be preceded by custom.

Savigny was the author (Syst. i. p. 34 sq.) of the view, now generally accepted by German jurists, that custom is not one of the sources of law, but only its token or external manifestation; the law itself is grounded on the common legal consciousness of the nation. If the people, as a people, is conscious of a rule, or thinks that such or such a principle ought to be followed as law, this principle so asserts itself as to be applied and developed; the usage is thus evoked and occasioned by the principle which the popular mind approves and accepts, instead of being itself the source of that principle. The consciousness of the rule must precede the usage or custom, for it is upon this that the uniformity of action is based: if the uniformity of action is merely accidental, and not due to common consciousness of a rule, it is unreasonable and unfit to be law.

10 imitantur. Et non ineleganter in duas species ius civile distributum videtur. nam origo eius ab institutis duarum civitatium, Athenarum scilicet et Lacedaemonis, fluxisse videtur: in his enim civitatibus ita agi solitum erat, ut Lacedaemonii quidem magis ea, quae pro legibus observarent, memoriae mandarent, Athenienses vero ea, quae in legibus scripta reprehendissent, custodirent.

11 Sed naturalia quidem iura, quae apud omnes gentes peraeque servantur, divina quadam providentia constituta, semper firma atque immutabilia permanent: ea vero, quae ipsa sibi quaeque civitas constituit, saepe mutari solent vel tacito consensu populi vel alia postea lege lata.

The principle thus precedes and generates the usage; but the older view contains a certain truth, viz. that the principle first acquires practical validity through the usage of which it is the parent, exactly as ius scriptum acquires binding force through publication; and to this extent one can say with truth, that as a statute comes into existence through publication, so customary law comes into existence through usage or custom. Savigny also grants that in some cases the rule is actually begotten of the usage; in particular, where the substance of the rule is more or less immaterial, so long as the rule is there (e.g. fixing of legal periods, forms, etc.). On the whole subject see Holland's Jurisprudence, chap. v.

§ **10.** *Λακεδαιμόνιοι μὲν . . . ἔθεσιν ἐπαίδευον, οὐ λόγοις· Ἀθηναῖοι δὲ . . . ἃ μὲν χρὴ πράττειν ἢ μή, προσέτασσον διὰ τῶν νόμων* Josephus c. Apionem ii. 16, *μία τῶν ῥητρῶν, μὴ χρῆσθαι νόμοις ἐγγράφοις* Plutarch, Lycurgus 13. Nevertheless, the Attic writers often eulogise unwritten law, e.g. *Σόλωνα νόμων . . . ξυγγραφέα καὶ ἐθῶν τῶν ἀρίστων εὑρετήν* Lucianus, Anach. c. 14.

§ **11.** It is clearly said here that a statute may in effect be abrogated by a contrary custom: cf. 'legibus istis situ atque senio obliteratis' Gell. ii. 24, Plautus, Trinum. iv. 3. 30. 33, Livy 27, 8, and the strong expression of Julian in Dig. 1. 3. 32. 1 'Quare rectissime illud receptum est, ut leges non solum suffragio legislatoris, sed etiam tacito consensu omnium per desuetudinem abrogentur'. The very contrary seems to be maintained in a passage already cited in part (Cod. 8. 52. 2) 'Consuetudinis usus-que non vilis auctoritas est, sed non usque adeo suo valitura momento ut rationem vincat aut legem'. Perhaps the simplest way out of the difficulty is to suppose that the latter passage refers to a statute in which it is expressly provided that in no case shall it be taken to be repealed by a contrary custom of later development. Now if approved custom 'legis vicem sustinet', such a provision is absurd, and resembles the well-known rule privilegia ne irroganto in assuming that a sovereign is capable of being legally bound. The question was submitted to the Emperor Constantine, and he decides it in the passage cited from the Code: a custom can certainly abrogate a statute, but (he says) there is an exception to this general rule, if the statute itself contains a provision that no custom is

Omne autem ius, quo utimur, vel ad personas pertinet vel **12** G. i. 8.
ad res vel ad actiones. ac prius de personis videamus. nam parum est ius nosse, si personae, quarum causa statutum est, ignorentur.

III

DE IURE PERSONARUM

Summa itaque **divisio de iure personarum haec est, quod** G. i. 9.
omnes homines aut liberi sunt aut servi. Et libertas quidem **1**
est, ex qua etiam liberi vocantur, naturalis facultas eius quod cuique facere libet, nisi si quid aut vi aut iure prohibetur.
Servitus autem est constitutio iuris gentium, qua quis dominio **2**

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to be allowed to grow up in future contrary to its tenor; a provision addressed to the subject, and forbidding the custom itself, not to the sovereign, and forbidding the repeal of the statute.

For the permanence and immutability of natural law cf. Cicero, de Republ. iii. 22; Dig. 7. 5. 2. 1; 50. 17. 8. By such passages it is not meant that it is always binding on the citizen, but that what is 'natural' once is natural for ever; for, as Ulpian says, 'ius civile [iuri naturali] non per omnia servit' Dig. 1. 1. 6 pr. Similarly Gaius, speaking of the quasi usufruct mentioned in Bk. ii. 4. 2 infr., remarks that though the authority of the senate cannot overcome naturalis ratio, its commands are binding; Dig. 7. 5. 2. 1.

Tit. III. For the division of private law made in pr. see the Introduction to this Book.

§ **1**. Liberty does not require that one should be free to act against the laws, 'legum quum servi sumus, ut liberi esse possimus' Cicero pro Cluentio 53. 146. Cf. Persius, Sat. v. 86 'Liceat, iussit quodcunque voluntas, Excepto si quid Masuri [i. e. Sabinus' work on law] rubrica vetavit', Dio Chrysostom, Or. 14 *ὅσα μὴ ἀπείρηται ὑπὸ τῶν νόμων, μηδὲ προστέτακται, ὁ περὶ τούτων ἔχων τὴν ἐξουσίαν τοῦ πράττειν ὡς βούλεται . . . ἐλεύθερος.*

§ **2**. In respect of capacity of right, slavery is a condition of absolute 'rightlessness'. A slave could have no rights against either his master or any one else; and, remembering what has been said of the legal meaning of 'person' in the Introduction to this Book, it follows that a slave was not a 'person' at all: he had no caput, Tit. 16. 4 inf. The Roman lawyers looked upon him as a 'res', and applied to him, as an object of property, the same rules which they laid down as to domestic animals; so far as there is any difference of treatment it is due to the slave's possession of reason, so that (*a*) he is able to increase his master's means by his intellectual as well as by his physical powers, and (*b*) by manumission he is capable of becoming a 'person', which explains the treatment of his position in this book (Tit. 5).

In relation to his master, the slave's condition is one of absolute dependence: hence the application to him of the rules and ideas of

3 alieno contra naturam subicitur. Servi autem ex eo appellati sunt, quod imperatores captivos vendere iubent ac per hoc servare nec occidere solent. qui etiam mancipia dicti sunt,
4 quod ab hostibus manu capiuntur. Servi autem aut nascuntur aut fiunt. nascuntur ex ancillis nostris: fiunt aut iure gen-

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ownership, such as the capacity of being jointly owned by co-proprietors. Originally, the rights of a dominus over his slave were as absolute as over any other object of property: limitations were first imposed on them by the Emperors. Claudius gave freedom to slaves whom their masters had turned out of doors on account of ill-health or disease, and punished those that killed slaves who from some such cause had become a burden to them. A lex Petronia (a copy of which was found in Pompeii, so that its enactment must have been before A. D. 79) forbade slaves to be matched against wild beasts in the arena: 'post legem Petroniam et senatusconsulta ad eam legem pertinentia dominis potestas ablata est, ad bestias depugnandas suo arbitrio servos tradere. Oblato tamen iudici servo, si iusta sit domini querela, sic poenae tradetur' Dig. 48. 8. 11. 2. Hadrian animadverted in strong terms on the arbitrary killing of slaves without judicial sanction; and finally Antoninus Pius enunciated the general principle that they ought to be protected against unwarranted severity, Tit. 8. 2 inf.; cf. Gaius i. 53. By his enactment a man who killed his own slave without just cause became liable to the penalty of the lex Cornelia de sicariis, Bk. iv. 18. 5 inf.; and Constantine deprived a master of his property in newly-born slave children whom he abandoned: Cod. Theod. 5. 7. These laws, however, must not be supposed to have conferred rights upon the slave, and so made him a persona; they merely limited the general rights of ownership on grounds of expediency, and their rationale is well expressed by Gaius in the passage last referred to: 'male enim nostro iure uti non debemus; qua ratione et prodigis interdicitur bonorum suorum administratio.' For the whole subject see Mr. Poste's notes, Gaius, loc. cit. and Mr. Roby's note on Dig. 7. 1. 17. 1 in his edition of that Title (Introduction to Justinian's Digest, p. 128).

§ 3. For mancipium in its more technical sense see note on Tit. 8 pr.

§ 4. The general rule of the ius gentium was that children followed the condition of their mother, whatever might be that of the father: thus the children of a female slave (ancilla) were born slaves themselves. The most important exception to this, outside slavery, was introduced by a lex Minicia, which enacted, probably before the Social War, that the children of a Roman woman and an alien should be aliens: Gaius i. 78. In one or two other cases, anomalous rules of positive law reversed the general principle, so that the children of an ancilla were born free, those of a free-woman slaves. By the SC. Claudianum (Gaius i. 84–86) it was enacted that (1) the children of a free man by an ancilla, whom he believed to be free, should be free if males, slaves if females; but this rule was repealed by Vespasian in favour of the old principle of the ius gentium; (2) it might be agreed between a free-woman and the owner of a slave that though she

tium, id est ex captivitate, aut iure civili, cum homo liber maior viginti annis ad pretium participandum sese venumdari passus

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should remain free herself, children born of her by the slave should belong to the latter's master: this was repealed by Hadrian, Gaius i. 84; (3) if a free-woman knowingly cohabited with a servus alienus without the consent of the latter's master, and persisted in the intercourse after prohibition by him, after three denunciations on his part she was awarded to him as a slave by the magistrate, and her children, whether born before or after this award, shared her fate: her property passed to him with her person, Gaius i. 91, 160. This was only repealed by Justinian himself; Bk. iii. 12. 1 inf.

When a free person became a slave, he was said to suffer capitis deminutio maxima (Tit. 16. 1 inf.). Of this there was one mode iure gentium, and three iure civili. (1) It was a principle of ius gentium that a person becomes a slave by falling under the power of a foreign nation; this of course usually occurred in the form of capture in war, but it was sufficient if there was no friendly treaty or intercourse between the two peoples, Dig. 49. 15. 5. 2. Persons captured in civil war did not become slaves, Dig. 49. 15. 21. 1, nor did those who were captured by brigands, ib. 19. 2. Liberty lost in this way could be recovered by postliminium, Tit. 12. 5, and notes inf.; Tit. 20. 2. (2) In certain cases the law allowed a free person to be sold as a slave, e.g. those who attempted to evade public burdens by not having their names entered on the census, or who deserted or shirked military service; so too the insolvent debtor under the old law of execution by manus iniectio. In all these cases, which were obsolete long before Justinian, except possibly the last, it was necessary that the guilty person should be sold trans Tiberim, i.e. to a foreign people. From the time of Commodus, and possibly earlier, a libertus guilty of gross ingratitude to his patron might be sold as a slave by the latter or (later) revocatus in patroni servitutem, Tit. 16. 1 inf.; Sueton. Claud. 25; Dig. 37. 14. 5 pr.; Tac. Ann. xiii. 26, 27; Dig. 25. 3. 6. 1. Lastly, there was the case noticed in the text. The rule stated in Cod. 7. 16. 10 ('liberos privatis pactis non posse servos fieri certi iuris erat') had led to the kind of fraud referred to in the text as early as Plautus (Pers. i. 3. 55; iii. 1); and by the time of Mucius Scaevola it had become an established principle of praetorian law that if a free person twenty years of age collusively allowed himself to be sold as a slave, in the intention of sharing the price with the vendor, the praetor should refuse him the proclamatio in libertatem or liberalis causa and adjudge him actually a slave: this was confirmed by senatusconsulta, Dig. 40. 13. 3. (3) A free-woman might become a slave under the SC. Claudianum, see supr. (4) Persons condemned to death, to labour in the mines, or to fight with wild beasts, became servi poenae (Tit. 12. 3 inf.), i.e. slaves with no master at all: this was repealed by Justinian, Nov. 22. 8.

§ **5**. For the twofold division of men into liberi and servi Ulpian in Dig. 1. 1. 4 substitutes one of three classes: 'liberi, et his contrarium servi, et tertium genus liberti:' cf. Tit. 5 pr. inf. But between absolute

est. in servorum condicione nulla differentia est. In liberis G. i. 9. multae differentiae sunt. aut enim **ingenui** sunt aut **libertini.**

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slavery and complete legal freedom there were two intermediate conditions. The first of these is that of the statuliber (' qui statutam et destinatam in tempus vel condicionem libertatem habet ' Dig. 40. 7. 1 pr.); the other is that of the slave who was said ' in libertate esse ', i. e. who was manumitted in some mode not recognised as conferring full legal freedom (note on Tit. 5. 1 inf.), and who therefore remained a slave in the eye of the law, though protected by the magistrate in the actual enjoyment of liberty.

From these cases differ certain others in which a person, though actually free, was subject to an external control which limited his freedom, and placed him to a considerable degree in the position of a slave: (1) the free person bona fide serviens, i.e. who thinks he is a slave; in some matters, especially with regard to acquisition, he was treated as a slave, and all that he acquired under definite conditions belonged to his quasi dominus; see Bk. ii. 9. 4 inf., Gaius ii. 92. (2) The auctoratus, who hired himself out as a gladiator, Gaius iii. 199; the hirer could sue by actio furti if he were removed from his control. The gladiatorial fights were prohibited by Constantine, Cod. 11. 43. 1. (3) If a prisoner of war was redeemed, his owner had a kind of lien on him until the whole redemption sum was paid, and so long the ius postliminii was suspended. (4) The debitor addictus under the middle law of bankruptcy did not become his creditor's slave, but was bound to work for him until the debt was satisfied; see Gaius iii. 199 for a parallel between him and the auctoratus. (5) The free person in mancipio, for which see note on Tit. 8 pr. inf. (6) The colonus. Coloni (in this sense) were persons inseparably attached from birth to the soil of some particular estate or district (glebae adscripti) for purposes of cultivation; they were personally free, but as it were slaves of the land, ' licet condicione videantur ingenui servi tamen terrae ipsius cui nati sunt existimentur ' Cod. 11. 51. 1; under the later Empire they composed the greater part of the agricultural population. In many respects they were completely assimilated to slaves; thus their property was called peculium, and was considered, like themselves, an appendage of the soil, and if they ran away they could be recovered by real action: for a longer notice of them see Mr. Poste's note on Gaius iii. 146. One theory of the origin of colonatus is that it is to be traced to the Roman practice of distinguishing between town and country slaves (familia urbana and rustica); the latter, being engaged in tillage, seem always to have enjoyed a certain freedom of action, and came more and more to be regarded as accessions to the land; their position was actually much the same as that of the colonus, except that the status of the latter was a legal one, and it is urged that the transition from the unfree to the free condition perhaps resulted from some statute empowering domini to manumit rural slaves on condition of their remaining glebae adscripti and paying a substantial rent (canon) for their holdings. Other writers on the subject, however, among them Savigny, derive colonatus from repeated settlements of homeless and home-seeking barbarians in the Roman provinces.

IV

DE INGENUIS

Ingenuus is est, qui statim ut natus est liber est, sive ex duobus ingenuis matrimonio editus, sive ex libertinis, sive ex altero libertino altero ingenuo. sed et si quis ex matre libera nascatur, patre servo, ingenuus nihilo minus nascitur: quemadmodum qui ex matre libera et incerto patre natus est, quoniam vulgo conceptus est. sufficit autem liberam fuisse matrem eo tempore quo nascitur, licet ancilla conceperit. et ex contrario si libera conceperit, deinde ancilla facta pariat, placuit eum qui nascitur liberum nasci, quia non debet calamitas matris ei nocere, qui in utero est. ex his et illud quaesitum est, si ancilla praegnans manumissa sit, deinde ancilla postea facta peperit, liberum an servum pariat? et Marcellus probat liberum nasci: sufficit enim ei qui in ventre est liberam matrem vel medio tempore habuisse: quod et verum est. Cum autem ingenuus aliquis natus sit, non officit 1
illi in servitute fuisse et postea manumissum esse: saepissime enim constitutum est natalibus non officere manumissionem.

V

DE LIBERTINIS

Libertini sunt, **qui ex iusta servitute manumissi sunt.** G. i. 11.
manumissio autem est datio libertatis: nam quamdiu quis in

Tit. IV. The law as stated in the words 'et ex contrario . . . qui in utero est', unless the child was conceived in lawful wedlock, is contrary to the principle laid down by Gaius i. 89 'qui illegitime concipiuntur, statum sumunt ex eo tempore, quo nascuntur: qui legitime concipiuntur, ex conceptionis tempore' which is confirmed by Ulpian, Reg. 5. 10, and Neratius in Dig. 50. 1. 9. By the time of Paulus, however, this had been altered, 'id enim favor libertatis exposcit' Rec. Sent. 2. 24. 1–3. Paulus also agrees with Marcellus, a contemporary of Gaius, upon the question for which the latter's opinion is cited: 'media enim tempora libertati prodesse, non nocere etiam possunt' loc. cit. It will be seen from the words 'Sive ex libertinis' that the children of libertini were ingenui: originally those in the first degree were libertini themselves, Suetonius, Claud. 24.

§ 1. For the meaning of 'in servitute fuisse' see on Tit. 3. 5 supr.

Tit. V. By 'iusta servitus' is meant a slavery which is legal as well as actual, so that it is contrasted with mancipium, in servitute esse, and the slavery of a prisoner of war; i. e. the rights of ingenuitas were not destroyed by captivity, but could be recovered by postliminium; Dig. 49. 15. 21 pr.

The modes in which a slave could become free (and which are not

servitute est, manui et potestati suppositus est, et manumissus liberatur potestate. quae res a iure gentium originem sumpsit, utpote cum iure naturali omnes liberi nascerentur nec esset nota manumissio, cum servitus esset incognita; sed posteaquam iure gentium servitus invasit, secutum est beneficium manumissionis. et cum uno communi nomine homines appellaremur, iure gentium tria genera hominum esse coeperunt, liberi et his contrarium servi et tertium genus libertini, qui desierant esse servi. 1 Multis autem modis manumissio procedit: aut enim ex sacris constitutionibus in sacrosanctis ecclesiis aut vindicta aut inter amicos aut per epistulam aut per testamentum aut aliam quamlibet ultimam voluntatem.

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systematically discussed by Justinian, who confines himself in the main to manumission) are three in number, viz. (1) postliminium, note on Tit. 12. 5 inf.; (2) manumission, of which below; and (3) certain irregular modes in which freedom was conferred by positive law without manumission by the dominus (Dig. 40. 8 'Qui sine manumissione ad libertatem perveniunt'). Thus (*a*) the SC. Silanianum of Augustus' period liberated slaves who discovered their masters' murderers, and the same was done by later enactments as a reward for the detection of certain other crimes, Cod. 7. 13. (β) An edict of Claudius gave liberty to slaves exposed by their masters (see note on Tit. 3. 2 supr.). (γ) An enactment of Vespasian did the same for ancillae who were exposed to prostitution against the terms of the disposition under which they were acquired. (δ) If a slave were aliened under a promise to manumit, which the alienee failed to perform, the slave was declared free by a law of Marcus and Commodus. (ε) A number of senatusconsulta beginning under Trajan provide in the same manner for the enfranchisement of slaves to whom liberty was bequeathed by a fideicommissum. (ζ) Certain less important modes introduced by Leo and Justinian are noticed in Cod. 12. 5. 4 and Nov. 5. 2. 1; 123. 4. 17.

§ 1. Manumission was an act of the master by which the slave became free. Its effect, under the older law, was to make the slave not only free, but a citizen of Rome; indeed, he might even become a member of a Roman family by being given in adoption to a paterfamilias by his master, Gellius 5. 19, but under the later law this was not allowed. The act was thus one of political import (see Mr. Poste on Gaius i. 17), and therefore was required to be performed in some mode or other in which the state, by participation, could give its sanction and consent.

Such 'iustae ac legitimae manumissiones' (Gaius i. 17) were three in number. (1) Vindicta, a form of the praetor's voluntary jurisdiction, or prearranged suit at law: the freedom of the slave was affirmed in a real action (vindicatio) by an adsertor libertatis: the master, as defendant, instead of resisting the claim by laying the vindicta or rod on the slave before the praetor, released him (manu mittebat), thereby confessing

sed et aliis multis modis libertas servo competere potest, qui tam ex veteribus quam nostris constitutionibus introducti

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himself in the wrong, whereupon the praetor adjudged the slave free (Plautus, Mil. Glor. 4. 1. 15). The procedure, which at first was strictly that of the 'legis actio sacramenti' (for which see Gaius iv. 16, and Index, inf.) was simplified in course of time by the part of adsertor being played by one of the praetor's lictors, and by the release of the master from all formal cooperation: finally, the necessity of an adsertor was altogether dispensed with, and it was held sufficient if the master, accompanied by the slave, declared his intention of enfranchising him to the praetor, whenever ('semper' in the text is explained by Theophilus *καὶ ἐν ἀπράκτῳ ἡμέρᾳ*) and wherever he met the latter, and if the latter thereon formally adjudged him free: see § 2 of this Title, and for the process generally Poste's Gaius loc. cit. Upon the whole subject see Buckland, The Roman Law of Slavery, pp. 451-459. (2) Censu (for the census see General Introd. pp. 17 (note) and 21 supr.). The censor could make any one a citizen of Rome by entering his name on the census or official list, and this was used for manumission by the master's taking his slave to the censor and allowing him to make his 'professio' before him without entering an objection. Ulpian speaks of the census as a thing of the past, only three having been held since the Christian era, the last A. D. 74; the form was revived but once afterwards, A. D. 249, so that Justinian does not mention this as one of the modes in which a slave could gain his freedom: see Buckland, pp. 439, 440. (3) Testamento; the master declaring the slave free in his will, Ulp. Reg. 2. 7, whereby he became 'libertus orcinus', Bk. ii. 24. 2 inf., and was free from the moment the heir accepted the inheritance, unless the manumission was conditional or ex die (note on Tit. 20. 1 inf.): see Buckland, pp. 442–444. The master could also impose on the heir (or some other person) an obligation to manumit a slave (libertas fideicommissaria); here he became the freedman of the person by whom he was in fact manumitted, but this is not testamentary manumission: cf. Ulpian, Reg. 2. 7. 8.

These were in Cicero's time the only modes in which a manumitted slave could become free. If the master attempted to enfranchise him in any other way (e. g. by a declaration in the presence of witnesses—'manumissio inter amicos' Ulpian, Reg. 1. 18, Pliny, Ep. 7. 16, Seneca de Vit. Beat. 24. 2—by a letter, 'per epistulam,' Martial, Ep. 9. 89, Isidorus, Orig. 9. 4, or by treating him as free, e. g. convivii adhibitione, by inviting him to sit at meat with him—which were called manumissiones minus solennes), the man remained legally a slave, but was said 'in libertate esse', Gaius iii. 56, note on Tit. 3. 5 supr. A legal status was first conferred on slaves manumitted in any of these informal ways by the lex Iunia Norbana, for which see on § 3 inf. A new form of manumission (in ecclesiis) which had complete legal effect was introduced by Constantine, consisting in a declaration by the master in church in the presence of the congregation and the bishop, attested by a document signed by the latter; Cod. 1. 2.

2 sunt. **Servi** vero a dominis **semper manumitti solent : adeo**
G. i. 20. **ut vel in transitu manumittantur, veluti cum praetor aut proconsul** aut praeses in **balneum vel in theatrum eat.**

3 **Libertinorum** autem status tripertitus antea fuerat : nam
G. i. 12. qui manumittebantur, modo maiorem et iustam libertatem consequebantur et fiebant **cives Romani**, modo minorem et **Latini** ex lege Iunia Norbana fiebant, modo inferiorem et fiebant ex lege Aelia Sentia **dediticiorum numero.** sed dediticiorum quidem pessima condicio iam ex multis temporibus in desuetudinem abiit, Latinorum vero nomen non frequentabatur : ideoque nostra pietas omnia augere et in meliorem statum reducere desiderans in duabus constitutionibus hoc emendavit et in pristinum statum reduxit, quia et a primis urbis Romae cunabulis una atque simplex libertas competebat, id est eadem, quam habebat manumissor, nisi quod scilicet libertinus fit qui manumittitur, licet manumissor ingenuus sit. et dediticios quidem per constitutionem ex-

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The right of the full owner to manumit was originally subject to no restrictions, except so far as he was bound by any contract or testamentary disposition under which the slave came into his possession. Subsequently, however, limitations were imposed, in the main on political grounds, by the lex Aelia Sentia, A. D. 4, § 3 inf., and Tit. 6 pr., and the lex Fufia Caninia, Tit. 7 inf., and by the lex Iulia de adulteriis, Bk. iv. 18. 4 inf., in order to assist the conduct of criminal proceedings.

Until Justinian abolished the distinction between Bonitary and Quiritary ownership (note on Bk. ii. 1. 11 inf.) a slave might belong to one person ex iure Quiritium, and be 'in bonis' of another ; the latter alone could manumit him, but only so as to make him a Latinus Iunianus ; Ulpian, Reg. 1. 16. Where one person had a usufruct in a slave belonging to another, any attempt by the former to manumit him merely resulted in the extinction of his usufruct ; he could be manumitted by the owner, who, however, could not thus prejudice the right of the usufructuary ; Ulpian, ib. 19 : Justinian (Cod. 7. 15. 1) made some alteration in this. The same principles were observed in respect of a slave who had been given in security by pledge ; but the manumission of any slave in whom another person had a ius in re aliena made him Latinus only and not civis, until Latinitas was abolished by Justinian. For the manumission of a slave owned by joint proprietors see Bk. ii. 7. 4 and note inf.

§ 3. The date of the lex Iunia Norbana is uncertain. It is usually given as A. D. 19, but this can hardly be correct, for there are passages in Gaius (e. g. i. 29, 31) which strongly imply that the lex Aelia Sentia was the earlier law of the two. Girard, who places it between B. C. 44 and B. C. 27, points out that it is never called 'Norbana' except in Justinian's Institutes.

pulimus, quam promulgavimus inter nostras decisiones, per quas suggerente nobis Triboniano viro excelso quaestore antiqui iuris altercationes placavimus: Latinos autem Iunianos et omnem quae circa eos fuerit observantiam alia constitutione per eiusdem quaestoris suggestionem correximus, quae inter imperiales radiat sanctiones, et omnes libertos nullo nec aetatis manumissi nec dominii manumissoris nec in manumissionis modo discrimine habito, sicuti antea observabatur, civitate Romana donavimus: multis additis modis, per quos possit libertas servis cum civitate Romana, quae sola in praesenti est, praestari.

It bestowed on slaves manumitted 'minus solenniter' the rights of Latinitas (General Introd. p. 28 supr.), whence they were called Latini Iuniani. The Latinitas of the Latini coloniarii had conferred the commercium without the connubium, i. e. the power of holding property and engaging in commerce under the peculiar forms and protection of Roman law, and of making a testament valid iure civile. But these rights were seriously curtailed, in the case of Latini Iuniani, by the lex Iunia Norbana, which (Gaius i. 22-24) deprived them of the privileges of making a will, being named testamentary guardians, and benefiting as heir or legatee under the will of another person unless they acquired the civitas within a certain interval after the testator's death. Consequently, when a Latinus Iunianus died, as he could have no suus heres or agnate, his whole property went 'iure quodammodo peculii' to his patron; Bk. iii. 7, 4 inf. Justinian repealed the lex Iunia, and as to the modes of manumission to which it had related, he enacted that they should make a slave a full citizen provided they were evidenced by a document attested by five witnesses; Cod. 7. 6. The alii multi modi alluded to in § 1 are specified in the same constitution: among them are the formal designation of the slave by the master as his son, and the delivery to him of the documents by which his servitude could be proved. There were numerous modes in which a Latinus could attain the civitas; see Gaius i. 28–35, and Mr. Poste's notes.

The object of the lex Aelia Sentia (A. D. 4) was to throw obstacles in the way of inconsiderate manumissions, and to guard the state against the dangers which might result from the bestowal of citizenship on slaves of bad character and antecedents; it should thus be read in close connection with the lex Fufia Caninia, Tit. 7. inf. Four of its provisions concern us. (1) It enacted that slaves who had been guilty of some serious crime, or subjected to some degrading treatment by their masters for misconduct, if subsequently manumitted, should have only the same rights as dediticii, or enemies surrendered at discretion: 'lege itaque Aelia Sentia cavetur, ut qui servi a dominis poenae nomine vincti sint, quibusve stigmata inscripta sint, deve quibus ob noxam quaestio tormentis habita sit, et in ea noxa fuisse convicti sint, quique ut ferro aut cum bestiis

VI

QUI EX QUIBUS CAUSIS MANUMITTERE NON POSSUNT

G. i. 36, 37. **Non tamen cuicumque volenti manumittere licet. nam is qui in fraudem creditorum manumittit nihil agit, quia lex**
1 **Aelia Sentia impedit libertatem.** Licet autem **domino, qui**
G. i. 21. **solvendo non** est **testamento** servum suum cum libertate heredem instituere, ut fiat liber heresque ei solus et necessarius, si modo nemo alius ex eo testamento heres extiterit, aut quia nemo heres scriptus sit, aut quia is qui scriptus est

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depugnarent traditi sint, inve ludum custodiamve coniecti fuerint, et postea vel ab eodem domino vel ab alio manumissi, eiusdem condicionis liberi fiant, cuius condicionis sunt peregrini dediticii' Gaius i. 13. These were properly surrendered enemies who after their capitulation had not been granted any kind of local constitution or autonomy, and who therefore were not cives of any community whatever. They could not by any possibility rise to the status of cives Romani or even of Latini; the statute forbade them to live within one hundred miles of Rome under penalty of becoming slaves again without possibility of a subsequent manumission; and their property on decease went to their patron, Gaius iii. 74–76. This dediticia libertas was practically obsolete before Justinian ('nec in usu esse reperimus' Cod. 7. 5), and was formally abolished by him, as is stated in this section. (2) It placed restrictions on manumissions by masters less than twenty years of age, Tit. 6. 4 inf.; and also (3) provided that no slave under thirty years of age should be enfranchised so as to become a Roman citizen unless the manumission were by vindicta, and an adequate motive were proved before a council at Rome, and in the provinces before a body of twenty recuperatores; Gaius i. 18–20. This provision was repealed by Justinian; see this paragraph, ad fin. (4) It invalidated manumissions in fraud of creditors or patron; see Tit. 6 pr. inf., Gaius i. 37.

It was said above that a Latinus could in certain ways become a civis; there were also modes in which a libertus could become ingenuus, one of which, operative only under the old law, has been noticed in the note on § 1 supr. Ingenuitas, however, could be conferred by imperial grant ('natalibus restitui' Dig. 40. 11. 2); and by the acquisition from the emperor of the 'ius aureorum anulorum' a freedman became ingenuus during his lifetime, but could not prejudice his patron's rights of succession; Dig. 38. 2. 3 pr., Fragm. Vat. 226, Dig. 40. 10. 6. By Nov. 78. 1 and 2 Justinian bestowed the ius anulorum and natalium restitutio on all freedmen and freedwomen whatsoever: 'si quis manumittens servum aut ancillam suam . . . qui libertatem acceperit, habebit et aureorum anulorum et regenerationis ius.'

Tit. VI. For the term 'heres necessarius', and the purpose of instituting one's own slave, see Bk. ii. 19. 1 inf.

qualibet ex causa heres non extiterit. idque eadem lege Aelia Sentia provisum est et recte: valde enim prospiciendum erat, ut egentes homines, quibus alius heres extaturus non esset, vel servum suum necessarium heredem habeant, qui satisfacturus esset creditoribus, aut hoc eo non faciente creditores res hereditarias servi nomine vendant, ne iniuria defunctus afficiatur. Idemque iuris est et si sine libertate servus 2
heres institutus est. quod nostra constitutio non solum in domino, qui solvendo non est, sed generaliter constituit nova humanitatis ratione, ut ex ipsa scriptura institutionis etiam libertas ei competere videatur, cum non est verisimile eum, quem heredem sibi elegit, si praetermiserit libertatis dationem, servum remanere voluisse et neminem sibi heredem fore. In 3
fraudem autem creditorum manumittere videtur, qui vel iam eo tempore quo manumittit solvendo non est, vel qui datis libertatibus desiturus est solvendo esse. praevaluisse tamen videtur, nisi animum quoque fraudandi manumissor habuit, non impediri libertatem, quamvis bona eius creditoribus non sufficiant: saepe enim de facultatibus suis amplius quam in his est sperant homines. itaque tunc intellegimus impediri libertatem, cum utroque modo fraudantur creditores, id est et consilio manumittentis et ipsa re, eo quod bona non suffectura sunt creditoribus.

Eadem lege Aelia Sentia domino **minori** annis **viginti non** 4
aliter manumittere permittitur, quam si vindicta apud con- G. i. 38.
silium iusta causa manumissionis adprobata fuerint manumissi.

The lex Aelia Sentia did not apply to peregrini, to whom, however, this part of it relating to manumission in fraud of creditors was extended by a senatusconsultum under Hadrian; Gaius i. 47. Gaius says (i. 37) that the statute allowed a patron to revoke manumissions by his freedmen which would seriously impair his own rights of succession. For the sale of a deceased insolvent's property see Gaius iii. 78–80: it entailed posthumous infamia, whence it is said 'servus necessarius . . . non magis patrimonium quam infamiam consequi videtur' Cod. Theod. 2. 19. 3.

§ 2. The enactment referred to is in Cod. 6. 27. 5.

§ 4. The motive of this part of the statute is stated by Theophilus, *δι' εὔνοιαν τῶν ἐλὲυθερούντων· ἠπίστατο γὰρ ὡς . . . εὐχερῶς ἀπατῶνται . . . τὴν ἑαυτῶν ἐλαττοῦσιν ὑπόστασιν.* It would seem, however, from Gaius that the real objection was to the inconsiderate creation of citizens; for in i. 41 he says that a master under twenty, with the consent of the consilium, could make a slave a Latinus Iunianus by manumitting him inter amicos,

G. i. 39. 5 **Iustae autem manumissionis causae sunt, veluti si quis patrem
aut matrem aut filium filiamve aut fratrem sororemve
naturales **aut paedagogum** nutricem educatorem aut alumnum
alumnamve **aut collactaneum manumittat,** aut servum pro-
curatoris habendi gratia, aut ancillam matrimonii causa,
dum tamen intra sex menses uxor ducatur, nisi iusta causa
impediat, et qui manumittitur procuratoris habendi gratia ne
6 minor septem et decem annis manumittatur. Semel autem
causa adprobata, sive vera sive falsa sit, non retractatur.

G. i. 40. 7 **Cum ergo certus modus manumittendi minoribus viginti** annis **dominis per legem Aeliam Sentiam constitutus** sit, eveniebat, **ut, qui quattuordecim annos aetatis expleverit, licet testamentum facere possit et in eo heredem sibi instituere legataque relinquere possit, tamen, si adhuc minor sit** annis **viginti, libertatem servo dare non** poterat. quod non erat ferendum, si is, cui totorum bonorum in testamento dispositio data erat, uni servo libertatem dare non permittebatur. quare nos similiter ei quemadmodum alias res ita et servos suos in ultima voluntate disponere quemadmodum voluerit permittimus, ut et libertatem eis possit praestare. sed cum libertas inaestimabilis est et propter hoc ante vicesimum aetatis annum antiquitas libertatem servo dari prohibebat:

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so that no stress must be laid on 'vindicta' in this §. The consilium consisted at Rome of five senators and five knights above the age of puberty, who sat on fixed days; Gaius i. 20, Ulpian, Reg. 1. 13, Dig. 1. 10 pr. and 2.

§ 5. For the common employment of slaves as paedagogi cf. Plutarch, de educ. liberis 7, Plautus, Mercat. prolog. 89, Dig. 40. 5. 35. The difference between paedagogus and educator is perhaps that the boy passed from the charge of the first to that of the second at the age of twelve or thereabouts; Apul. Met. x. p. 687.

An ancilla manumitted with the consent of the consilium on the ground that the dominus intended to marry her did not become absolutely free until the marriage took place, Dig. 40. 2. 19; 40. 9. 21; the senate required the master to swear he would marry her within the six months, Dig. 40. 2. 13.

As appears from § 7 inf., no one was allowed to act as processual agent for another until he was seventeen years of age, from which we may infer that liberti were used as procurators mainly in matters of litigation.

§ 7. By Nov. 119. 2 Justinian enabled domini to manumit slaves by will immediately they had completed their fourteenth year.

ideo nos mediam quodammodo viam eligentes non aliter minori viginti annis libertatem in testamento dare servo suo concedimus, nisi septimum et decimum annum impleverit et octavum decimum tetigerit. cum enim antiquitas huiusmodi aetati et pro aliis postulare concessit, cur non etiam sui iudicii stabilitas ita eos adiuvare credatur, ut et ad libertates dandas servis suis possint provenire?

VII

DE LEGE FUFIA CANINIA SUBLATA

Lege Fufia Caninia certus modus constitutus erat **in servis testamento manumittendis.** quam quasi libertatibus impedientem et quodammodo invidam tollendam esse censuimus, cum satis fuerat inhumanum vivos quidem licentiam habere totam suam familiam libertate donare, nisi alia causa impediat libertati, morientibus autem huiusmodi licentiam adimere. G. i. 42.

VIII

DE HIS QUI SUI VEL ALIENI IURIS SUNT

Sequitur de iure personarum alia divisio. nam quaedam personae sui iuris sunt, quaedam alieno iuri subiectae sunt: G. i. 48.

Tit. VII. The lex Fufia Caninia (Gaius i. 42–46, Ulpian, Reg. 1. 24. 25, Paul. Sent. Rec. 4. 14) was passed in the reign of Augustus, about the same time as the lex Aelia Sentia (Suetonius, Octav. 40); its design was to put a check on the reckless testamentary manumissions by which testators sought to glorify themselves. It enacted that in future an owner of three slaves should be able by will to manumit only two; of from four to ten, only one-half; of from eleven to thirty, only one-third; of from thirty-one to one hundred, only a fourth; and of from one hundred and one to five hundred, only a fifth: but in no case might more than a hundred be enfranchised in this way. The slaves whom the testator wished to manumit must be specified by name (Ulpian, Reg. 1. 24), or by some adequate description: 'nominatim videntur liberi esse iussi, qui vel ex artificio, vel officio, vel quolibet alio modo evidenter denotati essent, veluti dispensator meus, cellarius meus, coquus meus, Pamphili servi mei filius' Dig. 40. 4. 24, Paul. Sent. Rec. 4. 14. 1.

If the testator attempted to evade the statute by naming more than made up the number permitted, and arranging their names in a circle, liberty was denied them all, 'quia nullus ordo manumissionis invenitur' Gaius i. 46. For Justinian's repeal of the lex Fufia Caninia see Cod. 7. 3.

Tit. VIII. 1. For the rights of a master over his slaves see on Tit. 3. 2 supr.

G. i. 49. **rursus earum, quae alieno iuri subiectae sunt, aliae in potestate** parentum, aliae in potestate dominorum sunt. **videamus**
G. i. 50. itaque **de his quae alieno iuri subiectae sunt: nam si cognoverimus, quae istae personae sint, simul intellegemus, quae**

Besides the public authority of the State over all men, free or slaves, who lived within its territory, the Roman law recognised certain powers resting purely on rules of the private code, and exercised by one man over others, free no less than unfree, in virtue of titles which carry us back to the very infancy of the people. The general term used to express this authority, which was invariably based on some family or quasi-family relation, was ius or potestas. A man was said to be sui iuris if he were not, alieni iuris if he were, subject to one or other of these forms of domestic control. One of them was the dominica potestas, upon which enough has been said already. With regard to free persons who were in some way or other legally dependent on a domestic superior, the term filius familias was used in a very general way to denote them all: 'nam civium Romanorum quidam sunt patresfamiliarum, alii filiifamiliarum, quaedam matresfamiliarum, quaedam filiaefamiliarum. Patresfamiliarum sunt, qui sunt suae potestatis, sive puberes, sive impuberes: simili modo matresfamiliarum. Filiifamiliarum et filiae, quae sunt in aliena potestate' Dig. i. 6. 4.

Justinian speaks of only one form of domestic authority over free persons, the patria potestas. When we turn to the passage in Gaius (i. 48, 49) which corresponds to this section of the Institutes, we find three: 'sed rursus earum personarum quae alieno iuri subiectae sunt, aliae in potestate, aliae in manu, aliae in mancipio sunt.'

Manus was a power which could be exercised only by males over females, and which originally could be exercised only by husbands over their wives; later, women came to be in manu to men who were not their husbands, but in these cases the relation was merely momentary. Both Gaius, ii. 159, and Ulpian, Reg. 22. 14 speak of the wife being in the manus of her husband even though the latter was in power: but it seems difficult to suppose that it was exercised by any one but the paterfamilias. The usual case is the manus of the husband, which in many of its incidents exactly resembled patria potestas; but as the moral relation of husband and wife is different from that between parent and child, there are points of contrast; e. g. though the wife in manu was said to be filiae loco, the husband had not, like the father, an absolute ius vitae necisque over her; he could inflict death only after a judicial consultation with the members of her old family, who had become her cognates: Dion. ii. 25; Tac. Ann. xiii. 32; Val. Max. ii. 9. 2; Pliny, Hist. Nat. xiv. 14. 3. In respect of property, however, a wife in manu and a child in power were on the same footing; all the wife's property went to the husband by a 'successio per universitatem' (Gaius iii. 80), and whatever she acquired subsequently she acquired for him (ib. ii. 90); her liability on contract is touched on in Gaius iv. 80.

Manus could arise in three ways, Gaius i. 110: by confarreatio, a

sui iuris sunt. ac prius dispiciamus de his qui in potestate dominorum sunt. G. i. 51.

1 **In potestate itaque dominorum sunt servi (quae quidem potestas iuris gentium est: nam apud omnes peraeque gentes animadvertere possumus dominis in servos vitae necisque potestatem esse) et quodcumque per servum adquiritur, id** G. i. 52.

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religious marriage ceremony in the presence of ten witnesses; by coemptio, a sale by the woman of herself by mancipation before five witnesses and a libripens; and by usus, continuous residence of the woman beneath her husband's roof for one year; absence for three nights in the year (per trinoctium) saved her her freedom. Though manus per usum was not unknown in Cicero's time (pro Flacco 34, cited by Mr. Poste in his note on this subject) it had become obsolete by that of Gaius, who says (i. 111) 'sed hoc totum ius partim legibus sublatum est, partim ipsa desuetudine obliteratum est', and possibly as early as Augustus (Tac. Ann. iv. 16). Confarreatio, on the other hand, was still practised in Gaius' age ('nam flamines maiores, id est, Diales, Martiales, Quirinales, sicut reges sacrorum, nisi sint confarreatis nuptiis nati, inaugurari non videmus' i. 112); but a law passed under Tiberius, A. D. 23, had enacted that a woman married by confarreatio should in future pass into her husband's manus only sacrorum causa; i. e., as Mr. Poste says, it only operated a change of family in respect of sacred rites; the woman ceased to have the domestic gods and worship of her father, and took in exchange those of her husband. But in secular matters her family was unchanged; she remained, if filiafamilias, subject to patria potestas, and did not become quasi-filiafamilias in the household of her husband: her old ties of agnation in her father's family were not snapped, and no new ties of agnation in her husband's family were acquired. Of course the whole institution passed away with the acceptance of Christianity as the national religion, if not before. Coemption, even as late as Gaius' day, was employed either for marriage, or for certain anomalous purposes, e. g. to extinguish the obligation of onerous sacred rites attached to the estate of an heiress, or to enable a woman to select her own guardian, or to break the ties of agnation, and thus become capable of making a will; see Mr. Poste on Gaius i. 108–115. Manus, though mentioned in the Vatican Fragments (General Introd. p. 70 supr.), had ceased to exist in any form before Justinian, in whose compilations it is not so much as referred to.

Mancipium (Gaius i. 116–123) was a form of legal control which arose from a citizen's right to sell free persons in his potestas or manus by mancipation; a person thus sold was said to be in mancipio to the purchaser. The features in which his position differed from that of a slave are pointed out by Mr. Poste on the sections of Gaius referred to. Whatever the free person in mancipio acquired belonged to his superior, except perhaps possession, as he himself was not possessed, Gaius ii. 90. Mancipium was not uncommon in Gaius' time; it was a comparatively permanent status in cases of 'noxae datio' (Gaius iv. 79), but a merely temporary and

2 domino adquiritur. sed hoc tempore nullis hominibus, qui
G. i. 53. sub imperio nostro sunt, licet sine causa legibus cognita et supra modum in servos suos saevire. nam ex constitutione divi Pii Antonini qui sine causa servum suum occiderit, non minus puniri iubetur, quam qui servum alienum occiderit. sed et maior asperitas dominorum eiusdem principis constitutione coercetur. nam consultus a quibusdam praesidibus provinciarum de his servis, qui ad aedem sacram vel ad statuas principum confugiunt, praecepit ut, si intolerabilis videatur dominorum saevitia, cogantur servos bonis condicionibus vendere, ut pretium dominis daretur, et recte: expedit enim rei publicae, ne quis re sua male utatur. cuius rescripti ad Aelium Marcianum emissi verba haec sunt: 'Dominorum quidem potestatem in suos servos illibatam esse oportet nec cuiquam hominum ius suum detrahi. sed dominorum interest, ne auxilium contra saevitiam vel famem vel intolerabilem iniuriam denegetur his qui iuste deprecantur. ideoque cognosce de querellis eorum, qui ex familia Iulii Sabini ad statuam confugerunt, et si vel durius habitos, quam aequum est, vel infami iniuria affectos cognoveris, veniri iube, ita ut in potestatem domini non revertantur. qui Sabinus, si meae constitutioni fraudem fecerit, sciet me admissum severius exsecuturum.'

IX

DE PATRIA POTESTATE

G. i. 55. In potestate nostra sunt liberi nostri, quos ex iustis nuptiis

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fictitious one in emancipations and adoptions. Justinian completely altered the form of the two latter, and abolished the noxal surrender of free persons (Bk. iv. 8. 7 inf.), so that in his system mancipium altogether disappears.

Tit. IX. The children born of lawful wedlock between an independent citizen and a woman with whom he had connubium were born in his potestas; and unless he died first, or they were voluntarily released by him, they remained under it, with trifling exceptions, to the day of their death. The peculiarity of this, as compared with other peoples, is noticed by many writers (Gaius i. 55; cf. Sextus Empir. Pyrrhon. iii. 24 *οἵ τε Ῥωμαίων νομοθέται τοὺς παῖδας ὑποχειρίους καὶ δούλους τῶν πατέρων κελεύουσιν εἶναι . . . παρ' ἑτέροις δὲ ὡς τυραννικὸν τοῦτο ἐκβέβληται*, Servius ad Verg. Aen. xi. 143 'filii in potestate patris . . . servi loco'). What is strange about it is not so much its stringency, as its survival, through centuries of legal history, to the time of Justinian, and its deliberate perpetuation

procreaverimus. Nuptiae autem sive matrimonium est viri et mulieris coniunctio, individuam consuetudinem vitae continens. 1

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in his legislation. This is explained in some degree by the Roman aversion to any change in old established custom which the advance in social conditions did not render absolutely necessary ; still more by the fact that the patria potestas of the sixth century of our own era was a very different institution from that of the earlier period ; the rights of the father over the person of the child had been largely curtailed by both law and custom, and by the development of the different kinds of peculium (Bk. ii. 9. 1, and notes, inf.), the position of the son in respect of property and contract had been largely assimilated to that of an independent person. But without doubt the chief reason why it had never been found necessary to cut short, by legislative interference, the duration of patria potestas at puberty or majority was the fact that to public matters it had no relation whatever. In respect of all public functions the filiusfamilias was an independent person : in the field of private law he was incapable of right, or power, or authority on his own account, but in all other matters he was as capable of right as his father : 'filiusfamilias in publicis causis loco patrisfamilias habetur, veluti ut magistratum gerat, ut tutor detur' Dig. 1. 6. 9, 'quod ad ius publicum attinet, non sequitur ius potestatis' Dig. 36. 1. 14 ; cf. Maine's Ancient Law, p. 139.

At first, perhaps, there was little to distinguish the power of a father over his children from that of a master over his slaves, except the fact that the filiusfamilias was always recognised as a 'persona' ; accordingly, though his pater could sell him, the purchaser could not own him as he could own a slave, but could only hold him in mancipio. The absolute control which the father possessed over him is best appreciated by considering the former's powers over his person, and the son's own position in respect of property, contract, and capacity to sue.

Originally the paterfamilias had ius vitae necisque over those in his power, so that, as Mr. Poste remarks, the lex Pompeia de parricidiis, B. C. 52 (Bk. iv. 18. 6 inf.) omits the father from the list of persons who could be guilty of 'parricide' : *a fortiori*, he possessed the right of uncontrolled corporal chastisement. But under the Empire these powers had dwindled to the mere right of bringing serious domestic offences under the cognisance of the magistrate, though in trifling matters the father might still take the law into his own hands : Cod. 8. 47. 3. The killing of a child was first made 'parricide' by Constantine ; in the time of Hadrian a father who had acted thus under great provocation had been deported to an island. From Plautus (Amphitruo i. 3. 3) it seems to have then been common for parents to expose their infants to perish of cold and hunger ; this was strictly prohibited A. D. 374 (Cod. 8. 52. 2) and a law of Diocletian and Maximian forbade children to be sold, pledged, or given away by their pater, though Constantine permitted their sale immediately after birth in cases of extreme poverty, reserving, however, an 'equity of redemption' which could in no way be forfeited. Justinian

G. i. 55. 2 **Ius** autem potestatis, quod in liberos habemus, **proprium est civium Romanorum: nulli enim alii sunt homines, qui talem**

(Nov. 134. 7) found it necessary to repeat the prohibition of child-pledging, and increased the penalties against creditors who attempted to enforce rights thus acquired; his abolition of noxal surrender of filiifamilias has been noticed on Tit. 8 pr. supr. So, too, the pater could originally marry his son or daughter to whomsoever he pleased, and divorce them at pleasure, besides transferring them to another family by adoption; 'but later in the imperial period the privilege of dictating marriage had declined into a conditional veto; and adoption itself, destined to lose almost all its ancient importance in the reformed system of Justinian, could no longer be effected without the assent of the child transferred to the adoptive parentage' (Maine, Ancient Law, p. 138). By a constitution of Marcus Aurelius the pater was forbidden to divorce a son or daughter in his power without the latter's consent. Accordingly, Ulpian says in Dig. 43. 30. 1. 5 'si quis filiam suam, quae mihi nupta sit, velit abducere, vel exhiberi sibi desideret, an adversus edictum exceptio danda sit, si forte pater concordans matrimonium, forte et liberis subnixum velit dissolvere? Et certo iure utimur, ne bene concordantia matrimonia iure patriae potestatis turbentur'.

In the field of property, the original rule was that the filiusfamilias could have no proprietary rights, and whatever he acquired by gift, inheritance, or otherwise, belonged to his father only. This doctrine was not broken in upon till the Empire, when, by the institution of peculium castrense, the son was enabled to own property acquired in certain modes. For this, and the later history of his proprietary rights, see Bk. ii. 9. 1, and notes inf.

In respect of contract the filiusfamilias had always been in a different position from a slave. A slave could be a party to a contract, and any advantage which was to be derived belonged to and could be sued for by the master (Bk. iii. 17 inf.); but if he attempted to bind himself by a promise the resulting obligation was 'naturalis' only, and neither he nor his master could be sued upon it; 'melior condicio nostra per servos fieri potest, deterior non potest' Dig. 50. 17. 133. Some alteration, however, was made in this latter point by the introduction of the actiones adiectitiae qualitatis, Bk. iv. 7 inf. But the promise of a filiusfamilias had always given rise to civilis obligatio: 'filiusfamilias ex omnibus causis tanquam paterfamilias obligatur, et ob id agi cum eo tanquam cum patrefamilias potest,' Dig. 44. 7. 39. Thus, on the son's contracts, the pater took all the gains, while for the debts the son was liable to be sued, the pater not. But it is not to be supposed that people would be over ready to contract with a person who had no means wherewithal to satisfy the judgment in case he was condemned, and upon whose person they could not, under the earlier law, at any rate, proceed to execution: hence we may say generally that, in Roman law, though the capacity to validly bind oneself by contract does not go hand in hand with proprietary capacity, yet the

in liberos **habeant potestatem, qualem nos habemus.** Qui 3 igitur ex te et uxore tua nascitur, in tua potestate est: item qui ex filio tuo et uxore eius nascitur, id est nepos tuus et neptis, aeque in tua sunt potestate, et pronepos et proneptis et deinceps ceteri. qui tamen ex filia tua nascitur, in tua potestate non est, sed in patris eius.

X

DE NUPTIIS

Iustas autem nuptias inter se cives Romani contrahunt, qui secundum praecepta legum coeunt, masculi quidem puberes

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practical exercise of that capacity probably did: and accordingly it was not until the filiusfamilias had acquired proprietary rights through the development of the doctrine of peculium, and the introduction of the actiones adiectitiae qualitatis had to some extent rendered a father liable on his son's engagements, that the latter's contractual capacity was often called into exercise.

As the filiusfamilias had no rights of property, so he could have no rights of action in respect thereof, and therefore could not, as a rule, sue in his own name in a court of justice: this principle being a consequence of the technicalities of the legis actio procedure: see Gaius ii. 96. To this there were a few exceptions: 'filiusfamilias suo nomine nullam actionem habet nisi iniuriarum, et quod vi aut clam, et depositi et commodati ut Iulianus putat' Dig. 44. 7. 9: cf. also Dig. 2. 4. 12; 5. 2. 8. pr. For an explanation of this anomaly see Mr. Poste on Gaius i. 55.

Patria potestas could originate in three ways: (1) by birth, as mentioned in this Title: (2) children not in the father's power at birth might be afterwards subjected to it by legitimation or some analogous process, Tit. 10. 13, and notes, inf.; (3) by adoption, Tit. 11 inf.

§ 3. Grandchildren by a son are in the power of their grandfather only if their father was himself subject to it at the time of their conception: if, before that time, he had been emancipated, they are born in his potestas, not in that of their grandfather: so too with great-grandchildren by a grandson, and so on. The children of a daughter, or of a granddaughter by a son, etc., were never in the power of her father or grandfather, but in that of their own father or paternal grandfather. This was expressed in the maxim 'mulier familiae suae et caput et finis est' Dig. 50. 16. 195. 5; cf. Maine, Ancient Law, p. 148.

Tit. X. Nuptiae, matrimonium, or marriage, has been defined in the preceding Title as 'viri et mulieris coniunctio, individuam vitae consuetudinem continens'. This definition was borrowed by Justinian from Modestinus, who says (Dig. 23. 2. 1), 'nuptiae sunt coniunctio maris et feminae, et consortium omnis vitae, divini et humani iuris communicatio.' The last words remind us that in the earliest days of Rome marriage was

feminae autem viripotentes, sive patres familias sint sive filii familias, dum tamen filii familias et consensum habeant

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a holy relation. In whatever form it took place which entailed manus, and not only in that of confarreatio, it founded a religious communion between husband and wife, and therefore received at its commencement a religious sanction. But in his own age Modestinus' words were a mere reminiscence of the primitive practice, and must not be understood to express the Christian conception of the married state, Christianity not having become the national religion till many years afterwards.

Iustae nuptiae, legitimum matrimonium, or marriage which would give patria potestas over the issue, required one special condition besides those necessary for marriage in general, viz. connubium, and this belonged to Roman citizens only, with the exception of certain classes or communities on whom it had been bestowed as a special boon ('connubium concessum' Ulpian, Reg. 5. 4); an example will be found in Gaius i. 57. After Caracalla (211–217 A. D.) had conferred the civitas on all free subjects of the empire, of course absence of connubium was rather the exception than the rule.

Apart from this, the general conditions of marriage were as follow: (1) Certain persons were absolutely incapable of contracting marriage, viz. slaves, castrati, lunatics and idiots, persons below the age of puberty, those already married, and women whose husbands had not yet been dead a certain time fixed by law. (2) The parties must not stand within certain degrees of relationship to one another, §§ 1–11 inf., and must (3) themselves consent to the marriage: 'nuptias non concubitus sed consensus facit' Dig. 50, 17. 30. (4) They must, if alieni iuris, have the consent of the persons in whose power they are: cf. with this paragraph Dig. 23. 2. 2 'nuptiae consistere non possunt, nisi consentiant omnes, id est, qui coeunt, quorumque in potestate sunt'. A man must have the consent, not only of the actual person in whose power he is, but also of those into whose power he may pass on the former's death: Dig 23. 2. 16. 1. For exceptional cases, in which the parent's consent was required for the marriage even of emancipated daughters, see Livy 4. 9, Cod. 5. 4. 1, 18 and 20. (5) Marriage was forbidden by positive law between the members of certain ranks or orders of society: e. g. between ingenuus and infamis, between senators and libertae, members of the dramatic profession, etc., by the lex Iulia et Papia Poppaea. Other enactments of a similar kind were made by Constantine, Cod. 5. 27. 1, Leo and Anthemius (Nov. Anthem. 1), and Justinus, Cod. 5. 4. 23. On the religious ground marriage was forbidden between Jew and Christian, and on account of official relation between the praeses and his provincial subjects, between the tutor and his female ward, etc. (6) Persons convicted of adultery with one another might not subsequently marry (Nov. 134. 14), and the same rule applied in cases of abduction, Cod. 9. 13. 1, Nov. 143. 150. Soldiers were unable to marry, while actually serving, until the fourth century.

Marriage was contracted merely by consent, and no form was prescribed by law. It is true that in the earlier period marriage was usually

parentum, quorum in potestate sunt. nam hoc fieri debere et civilis et naturalis ratio suadet in tantum, ut iussum parentis

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accompanied by manus, which, as we have seen, was not completely obsolete even in the time of Gaius; but the former was independent of the latter, which was superimposed on it by some additional ceremony or fact—confarreatio, coemptio, or usus. The agreement to marry was usually entered into by mutual promises (sponsalia), originally made by sponsio and restipulatio, Dig. 23. 1. 2, a form which would always support an action, so that we may believe that (in an indirect way) the action for breach of promise of marriage was not unknown to the early Romans; i. e. though they never allowed a direct action on the promise to marry, they allowed the stipulation of a penalty in case of breach, and this could be recovered. Finally, however, even this indirect form of compulsion came to be deemed contra bonos mores, and by the introduction of an exceptio doli even the exaction of the penalty was prevented, Dig. 45. 1. 134; and from this time onward the betrothal by stipulation seems to have been discontinued in favour of an informal engagement, and the principle was established, sufficit nudus consensus ad constituenda sponsalia. In earnest of the engagement mutual gifts (arrha sponsalicia, Cod. 5. 1) were usual, which were forfeited by a defaulting party, who had also to restore those given by the other side; and this forfeiture seems, with the exception of some social disapprobation, to have been the only penalty incurred for breach in the time of the classical jurists.

The transition from the state of betrothal to that of actual marriage was not effected by any necessary form, religious or otherwise, but by actual cohabitation, as evidenced by the wife going to live with the husband, accompanied by maritalis affectio, of which the deductio in domum, or taking home of the woman by the man, was regarded only as a proof. By Nov. 74. 4. 5 Justinian prescribed certain conditions for the marriage of imperial officials, but for the rest of the Roman world the old rule was left standing.

From iustae nuptiae one has to distinguish nuptiae simply. Originally, the former was the only kind of marriage known at Rome. Even, however, in the time of the Republic there had grown into almost equal recognition a matrimonium iuris gentium, a lawful wedlock of persons between whom there was not connubium, which, inferior to iustae nuptiae only in not creating patria potestas, was held in great favour under the empire. In Justinian's time every free subject of the empire practically had connubium, so that the distinction between nuptiae and iustae nuptiae, important before the edict of Caracalla, had ceased to have any significance.

The marriage state was terminated (1) by either party dying or becoming a slave. When the slavery resulted from captivity, postliminium had not originally the effect of restoring the married condition, but a fresh consensus was required if the parties still wished to be husband and wife, Dig. 49. 15. 14. 1. This rule, however, underwent a gradual

praecedere debeat. unde quaesitum est, an furiosi filia nubere aut furiosi filius uxorem ducere possit? cumque super

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change, and eventually captivity was regarded as in no way different from ordinary absence, proof being required of the absent party's death before the other could contract another marriage, Nov. 117. 11. (2) By 'incestus superveniens'; e. g. if a man adopts his daughter's husband, the latter thereby becomes his own wife's brother, Dig. 23. 2. 67. 3; cf. this Title, passim. (3) By divorce. Upon this the Romans held that as the essence of marriage lay in the maritalis affectio, it could be terminated by the mere mind of either party no longer to live in wedlock with the other; the continuance of the marriage depended on that of the affectio. Either party was thus free to terminate the connection at pleasure, and agreements surrendering this privilege were void: 'libera matrimonia esse antiquitus placuit, ideoque pacta ne liceat divertere non valere constat' Cod. 8. 39. 2. If the separation was effected by mutual arrangement, it was usually called divortium, if by the act of one party only, repudium: 'in repudiis vero, id est, renunciatione, comprobata sunt haec verba: tuas res tibi habeto: item haec, tuas res tibi agito' Dig. 24. 2. 2. 1. Persons who had been married by confarreatio could originally not be divorced at all (Fest. Ep. s. v. flammeo; Gell. Noct. Att. 10. 15); but from the time probably of Domitian (Plut. Quaest. Rom. 50) they could be separated by a religious form of divorce called diffarreatio. It seems uncertain, where manus was produced by usus or coemptio, whether the wife was as free 'repudium mittere' as when she was not in manu mariti, though Gaius says (i. 137) 'a wife subject to manus can no more compel her husband to release her therefrom without dissolution of the marriage than a daughter can compel her father to emancipate her'. A special form was prescribed for repudia by the lex Iulia de adulteriis, B. C. 17, which required the message to be delivered by a freedman of the family, in the presence of seven witnesses above the age of puberty, and citizens of Rome, Dig. 24. 2. 9.

The recklessness with which the right of divorce was exercised in the darker days of the empire is well known. For centuries the only attempts made to check the evil consisted in imposing certain proprietary disadvantages on persons who unjustifiably divorced their consorts, or who occasioned a divorce by their own infidelity. Thus a wife whose adultery led to her dismissal forfeited a sixth of her dos, and an eighth for more venial offences; and if there were children born of the marriage, the husband might retain for their benefit a sixth of the dos for each, though the whole amount thus retained might not exceed a half of the whole dos ('retentio propter liberos', Ulpian, Reg. 6. 9 sq.). A husband who occasioned a divorce had to restore the dos either at once, or at least before the whole time had elapsed for which, under ordinary circumstances, he would have been entitled to enjoy it. The acceptance of Christianity as the State religion brought with it a large amount of imperial legislation on this subject. On divorce by mutual consent no restraint was imposed until Justinian (Novels, 117. 10, and 134. 11), as a penalty, forced the

filio variabatur, nostra processit decisio, qua permissum est ad exemplum filiae furiosi filium quoque posse et sine patris

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parties into the retirement of a religious house. Repudiation was not forbidden: but from Constantine's time onward penalties were inflicted on the party who brought it about without one of the reasons specified in the imperial legislation. The penalties inflicted on the guilty parties, as fixed by Honorius, were loss of dos and donatio propter nuptias respectively. Repudiation without any such good reason was still more severely punished with enforced retirement to a cloister, and forfeiture of the whole property in favour partly of the cloister, partly of the guilty person's statutory heirs, Nov. 134. 11.

A few words are necessary on the proprietary relations of husband and wife. If the latter passed in manum, of course such property as she had went absolutely with her to the husband, Cic. Top. 4. 23: fragm. Vat. 115; but if the marriage was unaccompanied by manus, and the wife was not in potestas, her property remained as completely under her own control, and as free from that of the husband, as if she had never married at all. Yet the Roman law imposed on the husband the burden of all domestic expenses, and of the rearing of the issue; and it was doubtless this inequality which led to the institution of dos, which was a contribution from the wife or some one on her behalf towards defraying the expenses of the married state, 'ad matrimonii onera ferenda.' The obligation to provide a dos was imposed on the father or paternal grandfather partly by the lex Papia Poppaea, partly by imperial constitutions, and this whether the daughter or granddaughter was in power or not, Cod. 5. 11. 7. The mother was under no such obligation until after an enactment of Diocletian and Maximian, and then only under exceptional circumstances, Cod. 5. 12. 14; the wife was never bound to provide a dos herself at all. This led to a difference of terminology: 'dos aut profectitia dicitur, id est, quam pater mulieris dedit, aut adventitia, id est ea, quae a quovis alio data est' Ulpian, Reg. 6. 3: dos receptitia was a kind of adventitia, being a dos given by some third person other than a male ascendant on the express condition that it should be restored to him or some one else (dotis receptio) at the termination of the marriage. There could be no dos unless the wedlock were lawful, 'neque enim dos sine matrimonio esse potest; ubicunque igitur matrimonii nomen non est, nec dos est' Dig. 23. 3. 3, 'ibi dos esse debet, ubi onera matrimonii sunt' ib. 56. 1. If the husband were a filiusfamilias, the dos went to his pater, on whom the onera matrimonii fell. Anything could serve as dos whereby the property of the husband (or of his pater) was augmented—ownership, iura in re (e.g. usufruct), rights in personam, or release of a debt.

The modes of constituting a dos were three in number: dos aut datur, aut dicitur, aut promittitur. 'Dotem dicere potest mulier, quae nuptura est, et debitor mulieris, si iussu eius dicat, institutus, parens mulieris virilis sexus, per virilem sexum cognatione iunctus, velut pater, avus paternus: dare, promittere dotem omnes possunt' Ulpian, Reg. 6. 1 and 2;

interventu matrimonium sibi copulare secundum datum ex constitutione modum.

G. i. 58. **1** Ergo non omnes nobis uxores ducere licet; nam quarun-
G. i. 59. dam nuptiis abstinendum est. inter eas enim personas, quae parentum liberorumve locum inter se optinent, nuptiae contrahi non possunt, veluti inter patrem et filiam vel avum et neptem vel matrem et filium vel aviam et nepotem et usque ad infinitum: et si tales personae inter se coierint, nefarias atque incestas nuptias contraxisse dicuntur. et haec adeo ita sunt, ut, quamvis per adoptionem parentum liberorumve loco sibi esse coeperint, non possint inter se matrimonio iungi in tantum, ut etiam dissoluta adoptione idem iuris maneat: itaque eam, quae tibi per adoptionem filia aut neptis esse coeperit, non poteris uxorem ducere, quamvis eam emancipaveris.

G. i. 60. **2** Inter eas quoque personas, quae ex transverso gradu cognationis iunguntur, est quaedam similis observatio, sed non

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cf. note on Bk. iii. 15 pr. inf. The general rule was that the dos existed, as such, only during the continuance of the marriage, and at its termination must be restored to the woman or other person from whom it proceeded, Dig. 24. 3. 2; but this might be modified by special agreement, e.g. so as to give the husband a life interest. The latter became owner of the dotal property, and so entitled to its absolute management: 'si res in dotem dentur, puto, in bonis mariti fieri' Dig. 23. 3. 7. 3; cf. Gaius ii. 63, Bk. ii. 8 pr. inf.; in other passages, however, the wife's reversion is recognised as strictly qualifying the husband's ownership: e. g. 'quamvis in bonis mariti dos sit, mulieris tamen est' Dig. loc. cit. 75: and in Cod. 5. 12. 20 Justinian expresses an opinion that the dos belongs to the husband only 'legum subtilitate', and iure naturali is the property of the wife.

It was considered a matter of public interest to secure the return of the dos at the termination of the marriage, as a provision for the wife, or in case she married a second time. The husband often guaranteed this by stipulatio, but apart from this there was an action for recovery (dotis exactio, § 12 inf.) called actio rei uxoriae, which was bonae fidei in character: for Justinian's changes in this matter see Bk. iv. 6. 29 inf. The wife was also by an enactment of Justinian (Cod. 5. 13. 1. 1) a privileged creditor in case of the husband's insolvency, and the provisions of the lex Iulia de fundo dotali, with Justinian's amendments (Bk. ii. 8 pr. inf.), were directed to the same purpose. For this whole subject see Sir H. Maine's chapter on the history of the settled property of married women, in the Early History of Institutions; and for the counterpart of dos, the donatio ante or propter nuptias, Bk. ii. 7. 3, and notes, inf.

§ 1. This and the following sections contain the rules of Roman law

tanta. sane enim inter fratrem sororemque nuptiae prohibitae G. i 61.
sunt, sive ab **eodem patre eademque matre nati fuerint, sive** ex **alterutro eorum. sed si qua per adoptionem soror tibi esse coeperit, quamdiu quidem constat adoptio, sane inter te et eam nuptiae consistere non possunt : cum vero per emancipationem adoptio dissoluta sit, poteris eam uxorem ducere : sed et si tu emancipatus fueris, nihil** est **impedimento nuptiis.** et ideo constat, si quis generum adoptare velit, debere eum ante filiam suam emancipare : et si quis velit nurum adoptare, debere eum ante filium emancipare. **Fratris** vel sororis **filiam** 3 G. i. 62.
uxorem ducere non **licet.** sed nec neptem fratris vel sororis ducere quis potest, quamvis quarto gradu sint. cuius enim filiam uxorem ducere non licet, eius neque neptem permittitur. eius vero mulieris, quam pater tuus adoptavit, filiam non videris impediri uxorem ducere, quia neque naturali neque civili iure tibi coniungitur. Duorum autem fratrum 4
vel sororum liberi vel fratris et sororis iungi possunt. **Item** 5
amitam licet adoptivam **uxorem ducere non licet,** item **materteram,** quia parentum loco habentur. qua ratione verum est magnam quoque amitam et materteram magnam prohiberi uxorem ducere. Adfinitatis quoque veneratione 6
quarundam nuptiis abstinere necesse est. ut ecce **privignam** G. i. 63.
aut **nurum** uxorem ducere non licet, quia utraeque filiae loco sunt. quod scilicet ita accipi debeat, **si fuit nurus aut privigna : nam si adhuc** nurus est, id est si adhuc nupta est filio tuo, **alia ratione** uxorem eam ducere non possis, **quia eadem duobus nupta esse non potest :** item si adhuc privigna

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prohibiting certain marriages on the ground of kinship between the parties. It will be observed that adoptive was as effectual as natural relationship to bar such unions; and the same incapacity resulted in Justinian's time (Cod. 5. 4. 26) from 'cognatio spiritualis', the relation of godparent and godchild, and to a still larger degree under the Canon Law; see some remarks of Sir H. Maine, Early History of Institutions, pp. 240 sq. There is a good account of the prohibited degrees of Marriage in Marquardt, Privatleben der Römer, pp. 29 sq.

§ 3. Gaius (i. 62; cf. Tac. Ann. 12. 5, 7, Suetonius, Claud. 26) says that marriage between a man and his brother's daughter was legalized by Claudius, who married Agrippina under his own rule, though it was always unlawful to marry a niece by a sister. Diocletian first (Cod. 5. 4. 17) and then Constantine restored the ancient law, and branded marriage with a brother's daughter with the name of incest, Cod. Theod. 1. 2.

tua est, id est si mater eius tibi nupta est, ideo eam uxorem
ducere non poteris, quia **duas uxores** eodem tempore **habere**
7 non licet. Socrum quoque et novercam prohibitum est uxorem
ducere, quia matris loco sunt. quod et ipsum dissoluta
demum adfinitate procedit: alioquin si adhuc noverca est, id
est si adhuc patri tuo nupta est, communi iure impeditur tibi
nubere, quia eadem duobus nupta esse non potest: item si
adhuc socrus est, id est si adhuc filia eius tibi nupta est, ideo
impediuntur nuptiae, quia duas uxores habere non possis.
8 Mariti tamen filius ex alia uxore et uxoris filia ex alio marito
vel contra matrimonium recte contrahunt, licet habeant
9 fratrem sororemve ex matrimonio postea contracto natos. Si
uxor tua post divortium ex alio filiam procreaverit, haec non
est quidem privigna tua: sed Iulianus huiusmodi nuptiis
abstinere debere ait: nam nec sponsam filii nurum esse nec
patris sponsam novercam esse, rectius tamen et iure facturos
10 eos, qui huiusmodi nuptiis se abstinuerint. Illud certum est
serviles quoque cognationes impedimento esse nuptiis, si forte
11 pater et filia aut frater et soror manumissi fuerint. Sunt et
aliae personae, quae propter diversas rationes nuptias con-
trahere prohibentur, quas in libris digestorum seu pandec-
tarum ex veteri iure collectarum enumerari permisimus.

12 Si adversus ea quae diximus aliqui coierint, nec vir nec
G. i. 64. **uxor** nec nuptiae nec matrimonium nec dos intellegitur.
itaque ii, qui ex eo coitu nascuntur, in potestate patris non
sunt, **sed tales sunt**, quantum ad patriam potestatem pertinet,

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§ 4. Marriage between first cousins, which originally was unknown, gradually came to be permitted, Livy 42. 34, Tac. Ann. 12. 6, and after being prohibited by Theodosius I, was again made lawful by Arcadius and Honorius, Cod. 5. 4. 19.

§ 7. Marriage with a deceased wife's sister was forbidden by Constantine's sons in the East, and by Valentinian, Theodosius, and Arcadius in the West, Cod. 5. 5. 5.

§ 10. Slaves were incapable of marriage (sensu legali) of any kind, but a permanent connection between two slaves, or a slave and a free person, was called contubernium, Paul. Sent. Rec. 2. 19. 6. Here the natural relation of father and child was to some extent recognised: e.g. as iusta causa manumissionis under the lex Aelia Sentia, Gaius i. 19. Accordingly, when slaves had become free, and thus capable of intermarriage, they were held to be within the rules as to prohibited degrees.

§ 12. Children born of a connection which was not a legal marriage,

quales sunt ii, quos mater vulgo concepit. nam nec **hi patrem habere intelleguntur, cum is etiam incertus est : unde solent filii spurii appellari, vel a Graeca voce quasi** *σποράδην* **concepti vel quasi sine patre filii.** sequitur ergo, ut et dissoluto tali coitu nec dotis exactioni locus sit. qui autem prohibitas nuptias coeunt, et alias poenas patiuntur, quae sacris constitutionibus continentur.

Aliquando autem evenit, ut liberi, qui statim ut nati sunt in potestate parentum non fiant, postea tamen redigantur in 13 G.i.65.

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either because it was prohibited by some positive rule, or because there was no maritalis affectio, were deemed, as a rule, to have no father : 'vulgo concepti dicuntur, qui patrem demonstrare non possunt, vel qui possunt quidem, sed eum habent quem habere non licet, qui et spurii appellantur *παρὰ τὴν σποράν*' Dig. 1. 5. 23. Such a connection when it amounted to stuprum, adulterium, or incestus, was visited with severe penalties by the lex Iulia de adulteriis (Bk. iv. 18. 4 inf.) ; 'stuprum committit, qui liberam mulierem, consuetudinis causa, non matrimonii, continet, excepta videlicet concubina' Dig. 48. 5. 35. 1. From this it will be understood that concubinatus, a permanent connection without affectio maritalis, was a relation tolerated by law : the Romans say of it, 'per leges nomen assumpsit' Dig. 25. 7. 3. 1 ; i.e. it has received by statute a legal significance. In many respects it was assimilated to marriage : thus Ulpian says (Dig. 32. 49. 4) 'parvi autem refert, uxori an concubinae quis leget, quae eius causa emta parata sunt : sane enim, nisi dignitate, nihil interest'. But the position was thought a degrading one to the woman ; no 'honesta femina' could become a concubine without an express 'testatio', Dig. 25. 7. 3 pr. ; otherwise the relation was regarded as stuprum. A man could have but one concubine at a time, and concubinatus was incompatible with marriage : 'eo tempore quo quis uxorem habet, concubinam habere non potest : concubina igitur ab uxore solo dilectu separatur' Paul. Sent. Rec. 2. 20. The connexion was terminated by insanity of either party, except between patronus and liberta. The paternity of the children was recognised to a considerable extent, Cod. Theod. 4. 6. 7 : they were capable of legitimation, section 13 inf. ; and in the law of Justinian they were entitled to maintenance from the father, and under certain circumstances to succeed him on intestacy, Nov. 18. 5 : Nov. 89. 12. 4. 6. By the later emperors concubinatus was discouraged. The amount which the father might leave in his will to the mother and children was strictly limited by Arcadius and Honorius, but these restrictions were removed by Justinian where there were no legitimate children. The practice was altogether forbidden in the ninth century by Leo Philosophus. If a dos were given in a marriage which violated the rules as to prohibited degrees, it escheated, when the marriage terminated, to the Treasury, Cod. 5. 5. 4.

§ 13. In the time of Gaius children who were not in potestas at birth,

potestatem. qualis est is, qui, dum naturalis fuerat, postea curiae datus potestati patris subicitur. nec non is, qui a muliere libera procreatus, cuius matrimonium minime legibus interdictum fuerat, sed ad quam pater consuetudinem habuerat, postea ex nostra constitutione dotalibus instrumentis compositis in potestate patris efficitur: quod et aliis, si ex eodem matrimonio fuerint procreati, similiter nostra constitutio praebuit.

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owing to the nuptiae not being iustae, could sometimes be afterwards subjected to it by causae probatio, by which Latins and peregrini, with their consorts, obtained the civitas: their matrimonium thereby became legitimum, and even the children already born were subjected, by a process analogous to that of postliminium, to the resulting potestas. Among such causae were the birth of a child to a Latin father (Gaius i. 66), and justifiable mistake (ib. 67); see generally, Gaius i. 29–32, 66–75.

In Justinian's time, natural children could be subjected to potestas by legitimation, and this in three ways, two of which are mentioned in the text: (1) by oblatio curiae: i.e. the father made a son a decurio, or married the daughter to a decurio, in a provincial town. The decuriones formed a kind of town council, or body, which had to bear the burden of the magistracies (honores) and other municipal expenses (munera): though an honourable, it was an extremely costly function, and one which it had become practically necessary to either force or bribe persons to undertake; in the Theodosian Code (12. 18) they were prohibited from living in the country, lest the flavour of freedom should tempt them to run away altogether. (2) Per subsequens matrimonium. Constantine and some of his successors had enacted that marriage of a man with his concubine should legitimise their (natural) offspring, provided the man had no legitimate descendants. By Nov. 18. c. 11 Justinian abolished the latter restriction. The closing words of this section occasion considerable difficulty. To interpret them so as to make Justinian say that he had, by express enactment, conferred on children born after the execution of dotalia instrumenta identical privileges with those bestowed on children born before (and so in concubinatu) seems absurd: for the former class of children would be born of lawful wedlock, and so be in potestate anyhow, without any necessity for legislative interference. The meaning of 'praebuit' seems rather to be 'has been the occasion of their obtaining', the sense being 'we have hereby done a service not only to the children born before the marriage, but also to those born afterwards: for these too would have been illegitimate had it not been for our enactment, which has induced the man to make a wife of the woman who before was merely his concubine; and if he had not been induced to do so, he would have continued to live in concubinatu': cf. iii. 1. 2 inf. (3) Per rescriptum principis. Anastasius had permitted the legitimation of natural children in this manner, but it was forbidden by Justinus and Justinian: the latter, however, reintroduced it by two Novels (74 and 89), but allowed it only

XI

DE ADOPTIONIBUS

Non solum tamen naturales liberi secundum ea quae dixi- G. i. 97.
mus in potestate nostra sunt, verum etiam ii **quos adoptamus.** G. i. 98.
Adoptio autem duobus modis fit, aut principali rescripto **aut** 1

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where the marriage was no longer possible, owing to the death or disappearance of the woman, or her having married some one else, and the man had no legitimate descendants.

Legitimation, owing to its consequences, could not take place without the child's consent; ' . . . dum et filii hoc ratum habuerint. Nam si solvere ius patriae potestatis, invitis filiis, non permissum est patribus, multo magis sub potestatem redigere invitum filium et nolentem, sive per oblationem ad curiam, sive per instrumentorum celebrationem, sive per aliam quamlibet machinationem, tanquam sortem metuentem paternam iustum non est' Nov. 89. 11 pr.

Tit. XI. § 1. Adoptionis nomen est quidem generale: in duas autem species dividitur, quorum altera adoptio similiter dicitur, altera adrogatio. Adoptantur filiifamilias: adrogantur qui sui iuris sunt' Dig. 1. 7. 1. 1. Both parties in either kind of adoption must be cives, and the adopter, of course, must be sui iuris. In the parallel passage of Gaius (i. 98, 99) adrogation is said to take place populi auctoritate, and the term is explained: 'quod et is qui adoptat rogatur, id est, interrogatur an velit eum quem adoptaturus sit iustum sibi filium esse, et si qui adoptatur rogatur an id fieri patiatur, et populus rogatur an id fieri iubeat:' cf. Gell. v. 19; Cic. pro. dom. 29. Adrogation was thus originally effected by a legislative act of the comitia curiata, after a preliminary inquiry which was held by the pontifices because the adrogatus changed his family gods and worship (sacrorum detestatio) and this might conceivably be a reason for refusing to sanction the proposed adrogation. Subsequently the thirty curiae dwindled down to thirty lictors, who represented the authority of the people, and under the early empire the assent of the pontifices appears to have been the material element in the transaction (Tac. Hist. i. 15). The method of adrogation by imperial rescript was substituted for this by Diocletian, Cod. 8. 47. 2, who enacted that the rescript should have the same force as if the adrogation 'per populum iure antiquo facta esset.' From this time onward, instead of the preliminary pontifical inquiry, there was an investigation by a magistrate thereto commissioned by the emperor, of which the main purpose was the protection of the person to be adrogated, especially against the danger of adoption by some one much poorer than himself, whose motive might be mere avarice: adrogationes non temere nec inexplorate committuntur. Nam comitia arbitris pontificibus praebentur, quae curiata appellantur, aetasque eius, qui adrogare vult, an liberis potius gignendis idonea sit, bonaque eius, qui adrogatur, ne insidiose appetita sint, consideratur' Gellius, Noct. Att. 5. 10: this was particularly the case in the adrogatio of impubes, § 3 inf. The effects of adrogatio were to bring adrogatus under the potestas of adrogator, and with

G. i. 99. **imperio magistratus.** imperatoris auctoritate **adoptamus eos** easve, **qui** quaeve **sui iuris sunt. quae species adoptionis dicitur adrogatio. imperio magistratus adoptamus eos** easve, **qui** quaeve **in potestate parentium sunt, sive primum gradum liberorum optineant, qualis est filius filia, sive inferiorem,**
2 **qualis est nepos neptis, pronepos proneptis.** Sed hodie ex nostra constitutione, cum filius familias a patre naturali extraneae personae in adoptionem datur, iura potestatis naturalis patris minime dissolvuntur nec quidquam ad patrem adoptivum transit nec in potestate eius est, licet ab intestato iura successionis ei a nobis tributa sunt. si vero pater naturalis non extraneo, sed avo filii sui materno, vel si ipse pater naturalis

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him all those persons who had before been in his power: all his property passed to the adrogator per universitatem (Bk. iii. 10 inf.) until Justinian allowed the latter only the usufruct, ib. § 2; as to the debts of adrogatus see ib. § 3, Gaius iii. 82–84. Women could not be adrogated until the rescript form was introduced, because they could not appear in the comitia: Dig. 1. 7. 21.

§ 2. Adoption stricto sensu, where a paterfamilias gives a person in his power in adoption to some one else, seems not to have been practised in the early time, and the law provided no direct means for effecting it: hence the complicated nature of the process described by Gaius. The child was mancipated by the paterfamilias to the adopting party (in the case of a son this had to be repeated three times, the first two mancipations being followed by manumission at the hands of the alienee, Gaius i. 134), the object of this being the extinction of the patria potestas; he (or she) was then usually remancipated to the father, and by him finally ceded in iure to the adoptive parent. Another mode, practised only in the case of a son, was for the third mancipation to be made to some person different from both the patres (pater fiduciarius), by whom he was ceded in iure to the pater adoptans. Adoption being thus a judicial act was said to take place 'imperio magistratus'. In the earlier periods the consent of the child was unnecessary, but later this was altered, Dig. 1. 7. 5. For this complicated system Justinian substituted a simple declaration of the parties before a judge, which was registered in the acta, Cod. 8. 48. 11. Until the changes referred to in this section, the effect of adoption had been the translation of the adopted child from the potestas and family of the one parent to those of the other: to his old father he became iure civili a stranger, but acquired compensating rights of succession, &c., in his new family: he also remained cognate of the members of his old family: Dig. 38. 10. 4. 10. Justinian enacted that in future these consequences should ensue only where the adoptive father was a blood relation of the child in the ascending line (adoptio plena); if the adoptive father was any other relation or a stranger in blood (adoptio minus plena),

fuerit emancipatus, etiam paterno, vel proavo simili modo paterno vel materno filium suum dederit in adoptionem: in hoc casu quia in unam personam concurrunt et naturalia et adoptionis iura, manet stabile ius patris adoptivi et naturali vinculo copulatum et legitimo adoptionis modo constrictum, ut et in familia et in potestate huiusmodi patris adoptivi sit.
3 Cum autem **impubes** per principale rescriptum adrogatur, **causa** cognita adrogatio permittitur et exquiritur causa adrogationis, an honesta sit expediatque pupillo, et **cum quibusdam condicionibus** adrogatio fit, id est ut caveat adrogator personae publicae, hoc est tabulario, si intra pubertatem pupillus decesserit, restituturum se bona illis, qui, si adoptio facta non esset, ad successionem eius venturi essent. item non alias emancipare eos potest adrogator, nisi causa cognita digni emancipatione fuerint et tunc sua bona eis reddat. sed et si decedens pater eum exheredaverit vel vivus sine iusta causa eum emancipaverit, iubetur quartam partem ei suorum bonorum relinquere, videlicet, praeter bona, quae ad patrem G. i. 102.

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the child remained in his old family, and subject to the same potestas as before, but acquired a right of succeeding his adoptive father ad intestato, Cod. 8. 48. 10. The object of this change seems to have been to obviate the risk the child was exposed to, under the old law, of losing rights of succession in both families, which would happen if the adoptive emancipated him after the death of the natural father.

§ 3. The old rule was that an impubes could not be adrogated, Gell. 5. 19, Ulpian, Reg. 8. 5, no doubt for the same reason as women; then it was permitted in special cases, apparently by imperial favour (Gaius i. 102), and eventually an epistola of Antoninus Pius (Gaius ib.) allowed it generally, though only after inquiry held, and under conditions: thus all the pupil's guardians had to sanction the act, Cod. 5. 59. 5, and, as is mentioned in the text, the adrogator had to give security for restoration of adrogatus' property to his next heirs (legitimi or pupillariter substituti) if he died below puberty; this limit being fixed because at that date the pupillary substitutions became void, and the child, if he had not been adrogated, would have been able to make a will for himself. If on attaining puberty he could show that the adrogation had been detrimental to him he could demand emancipation, Dig. 1. 7. 33. The tabularius to whom security was given was a public official: earlier it was a servus publicus, Dig. 1. 7. 18, Cod. 8. 48. 2: cf. Gothofredus ad Cod. Theod. 8. 2. 1, and Cod. 10. 69. 3. The fourth part of the adrogator's property, to which adrogatus became entitled under the circumstances mentioned in the text, was called quarta Antonina or quarta divi Pii, and the right to claim it seems to have been extinguished by the attainment of puberty.

adoptivum transtulit et quorum commodum ei adquisivit
4 postea. Minorem natu non posse maiorem adoptare placet: adoptio enim naturam imitatur et pro monstro est, ut maior sit filius quam pater. debet itaque is, qui sibi per adrogationem vel adoptionem filium facit, plena pubertate, id est
5 decem et octo annis praecedere. Licet autem et in locum nepotis vel neptis vel in locum pronepotis vel proneptis vel
6 deinceps adoptare, quamvis filium quis non habeat. Et tam filium alienum quis in locum nepotis potest adoptare quam
7 nepotem in locum filii. Sed si quis nepotis loco adoptet vel quasi ex eo filio, quem habet iam adoptatum, vel quasi ex illo, quem naturalem in sua potestate habet: in eo casu et filius consentire debet, ne ei invito suus heres adgnascatur. sed ex contrario si avus ex filio nepotem dat in adoptionem,
8 non est necesse filium consentire. In plurimis autem causis adsimilatur is, qui adoptatus vel adrogatus est, ei qui ex legitimo matrimonio natus est. et ideo si quis per imperatorem sive apud praetorem vel apud praesidem provinciae non extraneum adoptaverit, potest eundem alii in adoptionem
G.i.103. 9 dare. Sed et **illud utriusque adoptionis commune est, quod et hi, qui generare non possunt, quales sunt spadones, adoptare**

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§ 4. The principle adoptio naturam imitatur, at least in this application, was of comparatively late growth, for Gaius says (i. 106) 'sed et illa quaestio, an minor natu maiorem natu adoptare possit, utriusque adoptionis commune est.' Cicero (pro Domo 13. 14) accuses Clodius of having been adrogated by a person younger than himself, though in c. 13 he says it was done with the approval of the pontifices: cf. Suetonius, Tib. 2. The doubt was settled by the time of Modestinus, who says that in either form of adoption the adoptans must be older by at least eighteen years, Dig. 1. 7. 40. 1. For the definition of this age as plena pubertas cf. Paul. Sent. Rec. 3. 4. 2, Dig. 40. 2. 13: 35. 1. 101. 2.

§ 5. *οὐ γὰρ ἀνάγκη ἕπεσθαι τῇ τάξει τῇ οὔσῃ παρὰ τῷ φυσικῷ πατρί* Theoph.

§ 8. One could not readopt an adoptive child whom one had emancipated or given in adoption, Dig. 1. 7. 37. 1, though this could be done with a natural child, in which case the latter was, in most respects, as if he had never left the family: but in relation to his own children, who had remained in their grandfather's power, his position was different: '. . . mortuo (avo) nepos in patris non revertitur potestatem' Dig. 1. 7. 41. Again, adoptive did not, like natural children, retain the ius liberorum after emancipation, Bk. iii. 1. 11 inf. For other minor differences between a natural and an adoptive child cf. Tit. 25 pr. inf., Fragm. Vat. 169, 196, Tac. Ann. 15. 19.

§ 9. After Justinian's changes, described on § 2 supr., it was of course

possunt, castrati autem non possunt. **Feminae** quoque **ado- ptare non possunt, quia nec naturales liberos in potestate** sua **habent** : sed ex indulgentia principis ad solatium liberorum amissorum adoptare possunt. **Illud proprium est illius ado- ptionis**, quae per sacrum oraculum fit, **quod is, qui liberos in potestate habet, si se adrogandum dederit, non solum ipse potestati adrogatoris subicitur, sed etiam liberi eius in eiusdem fiunt potestate tamquam nepotes.** sic enim et divus Augustus non ante Tiberium adoptavit, quam is Germanicum adoptavit: ut protinus adoptione facta incipiat Germanicus Augusti nepos esse. Apud Catonem bene scriptum refert antiquitas, servi, si a domino adoptati sint, ex hoc ipso posse liberari. unde et nos eruditi in nostra constitutione etiam eum servum, quem dominus actis intervenientibus filium suum nominaverit, liberum esse constituimus, licet hoc ad ius filii accipiendum ei non sufficit.

10 G. i. 104. 11 G. i. 107. 12

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impossible for a spado to adopt plene, because none could do this but a natural ascendant, and ex vi termini he could have no issue, but he could adrogate, Dig. 1. 7. 40. 2.

§ 10. The earliest instance of this quasi-adoption by women of which we know is that of Galba by his stepmother, Suet. Galba 4: it was first generally permitted by Diocletian and Maximian, in Cod. 8. 48. 5. Children thus adopted could of course not be in potestas, but the act produced the relation of parent and child, and thus conferred on the latter rights of intestate succession, and to bring the querela inofficiosi testamenti (Bk. ii. 18 inf.), if passed over in the adoptive mother's will.

§ 11. For the adoption of Tiberius by Augustus cf. Tac. Ann. 4. 57, Suet. Tiberius 15.

§ 12. It is not clear whether Cato was thinking of adrogation of a slave by his own dominus, or of the master's giving him in adoption to a third person, though certainly the words read in favour of the former view. According to that, his argument would seem to have been as follows:— a slave can become free by a resolution of the people, without manumission by his dominus: consequently adrogation by his master (which took place populi auctoritate) must make him free too. But possibly Cato was thinking of the second case, which many of the older jurists regarded as quite lawful: alioquin si iuris ista antiquitas servetur, etiam servus a domino per praetorem dari in adoptionem potest, idque ait (Sabinus) plerosque iuris veteris auctores posse fieri scripsisse, Gellius 5. 19. 11. Adoption (until Justinian) involved a vindicatio, as the adoptans claimed the adoptee as his son from his present father, and we may suppose that the jurists referred to by Gellius inferred from this vindicatio a tacit vindicatio 'in libertatem', and treated the giving in adoption as

XII

QUIBUS MODIS IUS POTESTATIS SOLVITUR

G. i. 124. **Videamus nunc,** quibus modis ii, **qui alieno iuri subiecti**
G. i. 126. **sunt, eo iure liberantur. et quidem servi quemadmodum potestate liberantur, ex his intellegere possumus, quae de**
G. i. 127. **servis manumittendis superius exposuimus. hi vero, qui in potestate parentis sunt, mortuo eo sui iuris fiunt. sed hoc distinctionem recipit. nam mortuo patre sane omnimodo filii filiaeve sui iuris efficiuntur. mortuo vero avo non omnimodo nepotes neptesque sui iuris fiunt, sed ita, si post mortem avi in potestatem patris sui recasuri non sunt : itaque si moriente avo pater eorum et vivit et in potestate patris sui** est, **tunc post obitum avi in patris sui potestate fiunt : si vero is, quo tempore avus moritur, aut iam mortuus est aut exiit de potestate patris, tunc hi, quia in potestatem eius cadere non**
G. i. 128. 1 **possunt, sui iuris fiunt. Cum autem is, qui ob aliquod maleficium** in insulam deportatur, **civitatem amittit, sequitur ut,**

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equivalent to a manumission by vindicta. Possibly, however, Cato was thinking of the slave being first mancipated by his master to another person, and then being claimed from the latter by the former as his son. The words of Gellius strongly suggest that under the later law slaves could not be given in adoption by their masters. The constitution referred to by Justinian is in Cod. 7. 6. 10.

The acta intervenientia were the official records of a magistrate or judge. Even under the Republic it had not been unusual for magistrates to co-operate in private dispositions by entering a minute of them in their records (gesta et acta), which entry served as irrefragable evidence of the transaction. Later, a special effect was in some cases given to such entries by statute (e. g. in testaments, and in the appointment of procurators), and after Constantine 'insinuatio' or entry in the acta was required by statute to give validity to many dispositions. Thus in Dig. 2. 4. 17 we have apud acta promittere (cf. Bk. ii. 7. 2 inf.) : actis mandatum insinuare (Bk. iv. 11. 3 inf.): actorum testificatione conficere donationem (Cod. 8. 54. 27) : apud acta contestari (Dig. 50. 2. 7. 3) : interrogari et profiteri (Cod. 7. 16. 24) ; and judicial appeals were also registered in the acta, apud or inter acta appellare, Dig. 49. 1. 2. The right to take acta belonged to municipal magistrates (Paul. Sent. Rec. 1. 3. 1, Cod. 1. 56. 2) as well as to magistrates with jurisdiction.

Tit. XII. What Justinian says about grandchildren not becoming sui iuris on the grandfather's death, if their own father is in the same potestas with them, must be qualified by what has been said above on Tit. 11. 8 in remarking upon Dig. 1. 7. 41.

§ 1. Gaius (i. 128) speaks of condemnation to loss of civitas as taking

quia eo modo ex numero civium Romanorum tollitur, perinde acsi mortuo eo desinant liberi in potestate eius esse. pari ratione et si is, qui in potestate parentis sit, in insulam deportatus fuerit, **desinit in potestate parentis esse.** sed si ex indulgentia principali restituti fuerint, per omnia pristinum statum recipiunt. Relegati autem patres in insulam in po- 2
testate sua liberos retinent: et e contrario liberi relegati in potestate parentum remanent. Poenae servus effectus filios 3
in potestate habere desinit. servi autem poenae efficiuntur,

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the form of aquae et ignis interdictio, which originally was merely a solemn confirmation of voluntary exile by which an accused citizen withdrew himself from a criminal prosecution, and only subsequently came to be used, apart from that, as a form of punishment: see Livy, 25. 4; 26. 3; Cic. pro Caec. 33. 34. Deportatio in insulam, a sentence of banishment for life either to an island or to some confined space on the mainland (Dig. 32. 1. 3) originated with Augustus (Dion. 55. 20), and was a very common form of punishment with his successors: Tac. Ann. 3. 68; 4. 13. 21; 6. 30. Deportation of either child or father put an end to potestas, because (Tit. 9. 2 supr.) 'ius potestatis proprium est civium Romanorum:' by losing his civitas the child lost his capacity of being in potestas, the father that of exercising it. In case of restoration by imperial favour, as mentioned in the text, it seems that at first only such rights were recovered as were expressly specified (Vitellius ab exilio reversis iura libertorum concessit, Tac. Hist. 2. 92), and this was true in particular of patria potestas: 'in insulam filio deportato, hacque ratione vinculo paternae potestatis exempto, si postea ex indulgentia divi Alexandri, ut proponis, reditus in patrium solum praecedensque dignitas restituta sit, potestas tamen patria repetita non videtur' Gordian in Cod. 9. 51. 6; but this must probably be taken to have been overruled by Constantine in Cod. loc. cit. 13, 'in quaestione testamenti, quod deportati filius remeante patre fecisset, remotis Ulpiani atque Pauli notis Papiniani placet valere sententiam, ut in patris filius sit potestate, cui dignitas ac bona restituta sunt.' It will be observed that here the termination of the patria potestas was accompanied by capitis deminutio. In one or two anomalous cases, however, the pater was deprived of his potestas as a punishment, without the child being capite minutus: e. g. for exposing his children, Cod. 8. 52. 2, for compelling them to prostitute themselves, Cod. 11. 40. 6, and for contracting an incestuous marriage, Nov. 12. 2.

§ 2. Relegation was banishment unattended with any loss of civil rights: 'relegati in insulam in potestate suos liberos retinent, quia et alia omnia iura sua retinent: tantum enim insula eis egredi non licet: et bona quoque sua omnia retinent praeter ea, si quae eis adempta sunt' Dig. 48. 22. 4. So too Ovid says (Trist. 4. 9. 11) 'Omnia . . . Caesar mihi iura reliquit, Et sola est patria poena carere mea'.

§ 3. For the poenae servus see on Tit. 3. 4 supr. Loss of liberty of

4 qui in metallum damnantur et qui bestiis subiciuntur. Filius familias si militaverit, vel si senator vel consul fuerit factus, manet in patris potestate. militia enim vel consularis dignitas patris potestate filium non liberat. sed ex constitutione nostra summa patriciatus dignitas ilico ab imperialibus codicillis praestitis a patria potestate liberat. quis enim patiatur patrem quidem posse per emancipationis modum suae potestatis nexibus filium relaxare, imperatoriam autem celsitudinem non valere eum quem sibi patrem elegit ab aliena eximere

G.i.129. 5 potestate? **Si ab hostibus captus fuerit parens, quamvis servus hostium fiat, tamen pendet ius liberorum propter ius postliminii :** quia **hi, qui ab hostibus capti sunt, si reversi fuerint, omnia pristina iura recipiunt.** idcirco **reversus** et **liberos habebit in potestate,** quia postliminium fingit eum qui captus est semper in civitate fuisse: **si vero** ibi decesserit, exinde, ex quo captus est pater, filius sui iuris fuisse videtur. **ipse quoque filius neposve si ab hostibus captus fuerit, similiter dicimus propter ius postliminii** ius quoque potestatis **parentis**

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course entailed loss of citizenship, whether the master were 'poena' or any one else, Tit. 16. 1 inf.

§ 4. There had always been certain dignities, by the attainment of which a child in power was released therefrom without undergoing capitis deminutio: thus a son who became flamen Dialis, and a daughter who became virgo Vestalis (Gaius iii. 114, i. 130) were released from power, though still remaining members of their old agnatic family. The Patriciate of the later empire seems to have originated in the old practice of calling persons of advanced age pater as a compliment or token of respect, Horace, Ep. 1. 6. 54–55, Νέρων . . . πατέρα αὐτὸν ἀεὶ ὀνομάζων Dio Cass. 63. 17, 'ad Ulpianum praefectum praetorio et parentem meum' Alexander in Cod 4. 65. 4. Besides the Patriciate, Justinian attached this effect also to elevation to sundry other high dignities, especially that of consul and bishop, Cod. 12. 3. 5.

§ 5. The ius postliminii was an institution by which rights which under ordinary circumstances would have been destroyed (by captivity) were merely suspended for an indefinite time, until the occurrence of some event. It has two aspects, passive and active. In the former, a person returning, or a thing recovered, from captivity is restored to the power in which he or it was previous to the capture: e.g. free persons in power (Bk. ii. 1. 17. inf.), slaves, land, ships of war, horses and mules, Dig. 49. 15. 2. 3 and 19. 10, Cic. Top. 8. In its active aspect, a person who has been in captivity recovers all his previous rights, provided (1) that this was the intention of his return, Dig. 49. 15. 5. 3: (2) that he did not desert, or voluntarily surrender, or was not surrendered by the state: i. e. he

in suspenso esse. dictum est autem postliminium a limine et post, ut eum, qui ab hostibus captus in fines nostros postea pervenit, postliminio reversum recte dicimus. nam limina sicut in domibus finem quendam faciunt, sic et imperii finem limen esse veteres voluerunt. hinc et limes dictus est quasi finis quidam et terminus. ab eo postliminium dictum, quia eodem limine revertebatur, quo amissus erat. sed et qui victis hostibus recuperatur, postliminio rediisse existimatur. **Prae-** 6 G.i.132.
terea emancipatione quoque **desinunt liberi in potestate parentum esse. sed** ea emancipatio antea quidem vel per antiquam legis observationem procedebat, quae per imaginarias venditiones et intercedentes manumissiones celebrabatur, vel ex imperiali rescripto. nostra autem providentia et hoc in melius per constitutionem reformavit, ut fictione pristina explosa recta via apud competentes iudices vel magistratus

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must have been bona fide captured with arms in his hands: and (3) that the return did not take place during an armistice, Dig. 49. 15. 19. 1. In Gaius' time the exact position of children whose father died in captivity was not settled: 'si vero illic mortuus sit, erunt quidem liberi sui iuris, sed utrum ex hoc tempore quo mortuus est apud hostes parens, an ex illo quo ab hostibus captus est, dubitari potest' i. 129. The derivation of the word given in this section originated with Scaevola, and was accepted by Festus, Boethius, and Isidorus, but rejected by Sulpicius, Cic. Top. 8.

For the recovery of his tutela by a tutor under the ius postliminii see Tit. 20. 2 inf.; and for the application of the doctrine to testaments, Bk. ii. 12. 5 inf.

§ 6. Emancipation was not effectual unless three conditions were satisfied: (1) The consent of the pater; the general rule is stated in § 10 inf., to which a few exceptions are noticed in Dig. 1. 7. 32. 33; 27. 10. 16. 2; 35. 1. 92; 37. 12. 1. 3; ib. 5. (2) The consent of the child, Paul. Sent. Rec. 2. 25. 5: it was sufficient, however, if he did not protest against the emancipation: 'solvere ius potestatis invitis filiis non est permissum patribus,' Nov. 89. 11 pr. (3) Due performance of the act of emancipation. This, as described by Gaius (i. 132), was effected by the pater's mancipating the child to a friend fiduciae causa, who remancipated him to the pater, and by the latter's then manumitting him, like a slave, vindicta. If it were a son three mancipations were necessary, owing to the rule of the XII Tables, 'si pater filium ter venumduit, a patre filius liber esto:' after each of the two first mancipations he was manumitted by the alienee, whereby he again fell under the patria potestas; the third mancipation was made cum fiducia, and was followed by remancipation to, and manumission by, the emancipating father, unless the remancipation were dispensed with, and the child were actually manumitted by the alienee, usually under

parentes intrent et filios suos vel filias vel nepotes vel neptes ac deinceps sua manu dimitterent. et tunc ex edicto praetoris in huius filii vel filiae, nepotis vel neptis bonis, qui vel quae a parente manumissus vel manumissa fuerit, eadem iura praestantur parenti, quae tribuuntur patrono in bonis liberti: et praeterae si impubes sit filius vel filia vel ceteri, ipse parens
7 ex manumissione tutelam eius nanciscitur. Admonendi **autem**
G. i. 133. **sumus liberum esse arbitrium ei, qui filium et ex eo nepotem** vel neptem **in potestate habebit, filium quidem de potestate dimittere, nepotem vero** vel neptem **retinere**: et **ex diverso, filium quidem in potestate retinere, nepotem vero** vel neptem **manumittere** (**eadem et de pronepote** vel pronepte **dicta esse**
8 **intellegantur**), **vel omnes sui iuris efficere.** Sed et si pater filium, quem in potestate habet, avo vel proavo naturali secundum nostras constitutiones super his habitas in adoptionem dederit, id est si hoc ipsum actis intervenientibus apud competentem iudicem manifestavit, praesente eo qui adoptatur et non contradicente nec non eo qui adoptat, solvitur quidem ius potestatis patris naturalis, transit autem in huiusmodi parentem adoptivum, in cuius persona et adoptionem plenissimam
9 esse antea diximus. Illud autem scire oportet, quod, si nurus tua ex filio tuo conceperit et filium postea emancipaveris vel

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an agreement to hold the iura patronatus in trust for the father; see on Bk. iii. 2. 8 inf. For this clumsy form Justinian substituted (Cod. 8. 49. 6) a simple declaration before a judge or magistrate, which was registered in the acta. 'Recta via,' in the text, is explained by Cod. 8. 49. 6 'sine sacro rescripto', a reference to emancipation by imperial rescript, which was introduced by Anastasius (Cod. loc. cit. 5), and was mainly resorted to when absence of the child prevented the old form from being employed. As, under the later law, emancipation was a mark of favour, it could, from Constantine's time, be revoked on account of ingratitude: Fragm. Vat. 248: Cod. 8. 49. 1. For the effect of emancipation on filiusfamilias' property see Bk. ii. 9. 2, and notes inf.: he was allowed to retain his peculium profectitium unless it was expressly taken from him, Fragm. Vat. 261. Of the iura patronatus, said in the text to have been given to the emancipating pater by the edict, the most important was the right of succession, guaranteed by the praetor through the system of bonorum possessio; see Bk. iii. 2. 6 inf., and Dig. 37. 12. 1.

§ 9. This is only an illustration of the rule that the status of children born of lawful wedlock was determined at the time of their conception, because they followed the condition of their father: 'hi qui legitime concipiuntur ex conceptionis tempore statum sumunt' Gaius i. 89. On the

in adoptionem dederis praegnante nuru tua, nihilo minus quod ex ea nascitur in potestate tua nascitur: quod si post emancipationem vel adoptionem fuerit conceptum, patris sui emancipati vel avi adoptivi potestati subicitur: et quod neque naturales liberi neque adoptivi ullo paene modo possunt cogere parentem de potestate sua eos dimittere.

XIII

DE TUTELIS

Transeamus nunc ad aliam divisionem. nam ex his per- G. i. 142.
sonis, quae in potestate non sunt, quaedam vel in tutela sunt

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other hand, illegitimate children followed the condition of their mother, being 'spurii', Tit. 10. 12 supr., and accordingly in the time of Gaius their condition was determined by her status at the time of birth: for the later modification of this rule see Tit. 4, and note supr.

If the potestas were terminated in some mode by which the filiusfamilias underwent capitis deminutio, he ceased to belong to his previous agnatic family, and thereby lost all his rights of intestate succession and guardianship to its members: consequently the distinction between modes in which this occurred and those in which it did not is important. The former are three in number: loss of libertas or civitas (apart from the ius postliminii), emancipation, and subjection to some other power, whether potestas, manus, or mancipium (e. g. the latter as produced in noxal surrender before Justinian).

§ **10.** One exception to this rule is noted on Tit. 11. 3 supr.: others are the case of harsh treatment by the father, Dig. 37. 12. 5: and where the latter accepted a benefit on condition of releasing the child: Paul. Sent. Rec. 4. 13. 1.

Tit. XIII. Tutela was originally conceived rather as a right than as a duty (whence the phrase 'tutelam nancisci', Tit. 12. 6 supr., Tit. 19 pr. inf.; cf. the definition of it in § 1 inf.), but in Justinian's time it had become a publicum munus (Tit. 25 pr. inf.), a function which the state required all its qualified members to discharge if called upon, and from which they could be excused only on definite grounds enumerated in Tit. 25 inf. Women, however, peregrini, slaves, minors (Tit. 25. 13 inf.), and soldiers (ib. 14) were absolutely incapacitated from serving the office, though under the earlier Emperors this rule was sometimes relaxed by special favour on behalf of the mother or grandmother of the ward: and in the time of Justinian it was settled that a mother or grandmother could after the death of her husband demand the tutela of her children or grandchildren, provided (1) she engaged 'apud acta' (see on Tit. 11. 12 supr.) not to marry again; (2) resigned the benefits of the SC. Velleianum and other enactments passed in favour of the weaker sex, and (3) gave an express hypothec to the children over her whole property. A second marriage caused immediate forfeiture of the tutela.

vel in curatione, quaedam neutro iure tenentur. videamus igitur de his, **quae in tutela vel in curatione sunt : ita enim**

Under the later law, the leading idea in the conception of tutela is the pupil's imperfect capacity of disposition, to supply which is the guardian's main duty (Tit. 21 inf.). According to modern ideas, incapacity of disposition results only from deficiency of intellectual powers, and this was the view which prevailed in the later Roman law; but it seems clear that in the earlier period the purpose of tutela was far less the protection of the ward than that of the ward's family: it was regarded as a right to look after his property, and to prevent any alienation by which it would leave the family in case of his decease before the tutela determined: hence the association between rights of guardianship and of succession: 'quo tutela redit, eo hereditas pervenit, nisi cum feminae heredes intercedunt' Dig. 50. 17. 73 pr. This conception of tutela is well illustrated by an institution which had become obsolete before Justinian, the perpetua tutela mulierum. Justinian speaks only of impuberes as under guardianship (§ 1), but the earlier Roman law maintained in the interest of the family the fiction of a woman's imperfect capacity of disposition, and retained her, if sui iuris, under the supervision of a tutor throughout her life: 'itaque si quis filio filiaeque testamento tutorem dederit, et ambo ad pubertatem pervenerint, filius quidem desinit habere tutorem, filia vero nihilominus in tutela permanet' Gaius i. 145. This mulierum tutela, at least in Gaius' time, was of two kinds. Its main object was to secure to the patron and the agnates their right to the woman's property at her death, not to protect the woman herself; thus, where the tutela was legitima, i. e. vested in the agnates or patron, she could neither subject herself to manus, Cic. pro Flacco 34, nor possibly even marry at all, Ulp. Reg. 11. 22: Livy 4. 9, make a will, manumit a slave, alienate res mancipi, bring a legis actio or iudicium legitimum, nor incur a contractual obligation without their auctoritas or sanction, Gaius, i. 192, Ulp. Reg. 11. 27. The XII Tables had appointed as a woman's guardian her patron if she were libertina or had been emancipated: failing a patron, her nearest agnates—all of these being the persons first in succession to her property on her decease. But, besides the tutela of the patron and agnates (tutores legitimi), other forms in course of time came into existence ('alterius generis tutores' Gaius i. 194), viz. (1) tutores optivi, selected by the woman herself under a power given by the will of a husband in whose manus she had been; (2) tutores fiduciarii, in case of a freeborn woman's manumission e mancipio (Gaius i. 115 a): (3) tutores cessicii; (4) tutores Atiliani, appointed by the magistrates. Testamentary guardians were as old as the XII Tables (note on § 3 inf.); but in relation to women they resembled the four kinds just specified in possessing but the shadow of those powers of veto and control which belonged to a tutor legitimus. The sanction of a tutor who was not legitimus was required to validate the woman's dispositions, wherever that of a statutory guardian would have been necessary: 'tutoris auctoritas necessaria est mulieribus quidem in his rebus: si lege aut legitimo iudicio agant: si se obligent, si civile negotium gerant, si libertae suae permittant in contubernio alieni

intellegemus ceteras personas, quae neutro iure tenentur. ac G. i. 143.

servi morari, si rem mancipi alienent' Ulpian, Reg. 11. 27; in 20. 15 he adds the execution of a will. But in all these cases the sanction was merely formal: 'pupillorum pupillarumque tutores et negotia gerunt, et auctoritatem interponunt: mulierum autem tutores auctoritatem duntaxat interponunt' Ulpian, loc. cit. 25, and the auctoritas of a non-statutory guardian could be demanded by the woman as a matter of right: 'loquimur autem de his scilicet feminis quae non in legitima parentium aut patronorum tutela sunt, sed de his quae alterius generis tutores habent, qui etiam inviti coguntur auctores fieri' Gaius ii. 120, 'saepe etiam [tutor] invitus auctor fieri a praetore cogitur' i. 190.

It was in respect of making a will that the woman was most restricted, the original rule being that no woman could do this who had not subjected herself to capitis deminutio by coemption, followed by remancipation and manumission, or, in other words, by a fictitious marriage, Gaius i. 115 a; she thus obtained a tutor fiduciarius, who authorized the testament 'dicis causa', ib. 190, though in all this business the interests of the patron or agnates were completely secured, for without their sanction at the first the coemption could not have taken place at all.

The only independent women who were exempted by the older law from perpetual guardianship were the vestal virgins, on whom this privilege had been bestowed by the XII Tables, Gaius, i. 145; but after the fall of the Republic important changes were made, especially in respect of testaments. The leges Iulia, probably of B.C. 18, and Papia Poppaea, A.D. 9 (often described as the lex Iulia et Papia Poppaea), released from guardianship all women who had borne a certain number of children (ius liberorum), and this boon must have benefited a considerable proportion of married women who were sui iuris. Not many years later a law of Claudius entirely abolished the legitima tutela of agnates over women, Gaius i. 157, and by a senatusconsult passed under Hadrian they were enabled to make a will without the necessity of a coemption, though the auctoritas of the guardian was not dispensed with. Thus, in the time of the classical jurists, every woman who was sui iuris, and who was not a vestal virgin or exempted under the lex Papia, must have a guardian: but his auctoritas was not requisite for the validity of all dispositions, and where it was he could not refuse it unless he were a patronus or parens manumissor; Gaius even says (i. 192) that a tutor legitimus would be compelled to give his auctoritas to the alienation of a res mancipi or the making of a contract, if there were a thoroughly sound reason for it. The whole institution in fact had ceased to have any significance, and the jurists themselves seem to have thought it an absurdity: 'feminas vero perfectae aetatis in tutela esse fere nulla pretiosa ratio suasisse videtur: nam quae vulgo creditur, quia levitate animi plerumque decipiuntur, et aequum erat eas tutorum auctoritate regi, magis speciosa videtur quam vera' Gaius i. 190. It is not, however, till after Diocletian that guardianship of women entirely disappears. Cf. Mr. Poste's note on Gaius i. 189, and Savigny, Vermischte Schriften i. 10.

1 **prius dispiciamus de his quae in tutela sunt.** Est autem tutela, ut Servius definivit, ius ac potestas in capite libero ad tuendum eum, qui propter aetatem se defendere nequit, iure
2 civili data ac permissa. Tutores autem sunt, qui eam vim ac potestatem habent, ex qua re ipsa nomen ceperunt. itaque appellantur tutores quasi tuitores atque defensores, sicut

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§ 1. Though the power of the tutor was data ac permissa by the civil law, tutela was not regarded by the Romans as an institution iuris civilis : 'impuberes autem in tutela esse naturali iure conveniens est, ut is qui perfectae aetatis non sit, alterius tutela regatur' Tit. 20. 6. inf., 'impuberes quidem in tutela esse omnium civitatium iure contingit' Gaius i. 189, the latter contrasting guardianship in this respect with patria potestas. Mr. Poste, on the other hand, ascribes it to ius civile, on the ground that no institution containing numerical definitions can be supposed to belong to natural law, if this is the less arbitrary element of the positive code. But this does not show that the institution is not iuris gentium, but only that each state fills up voids in the 'natural theory' by rules of its own, e. g. as to age, the persons who are to act, their precise powers, etc.

A guardian's responsibilities commenced immediately he was aware that the office had been cast upon him : 'ex quo innotuit tutori se tutorem esse, scire debet periculum tutelae ad eum pertinere' Dig. 26. 7. 5. 10, and if he had a valid excuse it had to be stated within the time allowed by law, or else it was of no avail, Dig. ib. 1. 1. The main purpose of the tutela impuberum, at least in the later Roman law, was the supplementing of the ward's imperfect capacity of disposition, and the guardian's functions related to both his person and his property. He was responsible for his maintenance and education, so far as his means sufficed, unless exempted from this by special direction of the appointing parent or magistrate. In relation to the property, his sphere of action depended greatly on the pupil's age. If he were infans (for which see on Bk. iii. 19. 10 inf.) he was incapable of any act or disposition, and the tutor was said 'negotia pupilli gerere' and to have the administratio. In this respect his freedom of action was largely curtailed by imperial legislation : 'imperatoris Severi oratione prohibiti sunt tutores et curatores praedia rustica vel suburbana distrahere (sell)' Dig. 27. 9. 1 pr. Constantine extended the prohibition still further : 'iam ergo venditio tutoris nulla sit nisi interpositione decreti, exceptis duntaxat his vestibus, quae detritae usu, aut corruptae servando servari non potuerint. Animalia quoque supervacua minorum, quin veneant, non vetamus' Cod 5. 37. 22. 6 and 7. Justinian forbade tutors and curators to intermeddle in the ward's affairs until they had caused a complete inventory of his property to be made, Cod. 5. 51. 13. 2. But on ceasing to be infans the pupil was held to acquire a power of volition, and thereby capacity of disposition ; yet his lack of intellectual powers was thought likely to betray him into transactions by which he might be injured, and thus the rule was established, that for all acts by which the pupil could

aeditui dicuntur qui aedes tuentur. **Permissum est itaque** 3 G. i. 144. **parentibus liberis** impuberibus, **quos in potestate habent, testamento tutores dare.** et hoc in filio filiaque omnimodo procedit; **nepotibus** tamen **neptibusque ita demum** parentes possunt G. i. 146. **testamento tutores dare, si post mortem** eorum **in patris sui potestatem recasuri non sunt. itaque si filius tuus mortis tuae tempore in potestate tua sit, nepotes ex eo non poterunt testamento tuo tutorem habere, quamvis in potestate tua fuerint; scilicet quia mortuo te** in patris sui potestatem recasuri sunt. **Cum** autem **in compluribus aliis causis postumi** 4 G. i. 147. **pro iam natis habentur, et in hac causa placuit non minus postumis quam iam natis testamento tutores dari posse, si**

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possibly injure his proprietary interests the guardian's auctoritas was necessary, though the former was regarded as himself the acting party, especially in dispositions which were iuris civilis, and therefore 'procuratorem non recipiebant;' see Tit. 21 pr. inf., and cf. the note on Bk. iii. 19. 10 referred to. The relation between guardian and pupil was quasi ex contractu, Bk. iii. 27. 2 inf., q. v.

§ 3. The right of the paterfamilias to appoint by his will tutors to such females in his power as would become sui iuris on his decease, and to such males in the same position as were impuberes, was established, if not for the first time conferred, by the XII Tables: 'testamento quoque nominatim tutores dati confirmantur eadem lege duodecim tabularum, his verbis: uti legassit super pecunia tutelave suae rei, ita ius esto: qui tutores dativi appellantur' Ulpian, Reg. 11. 14. The intended tutor must have testamentifactio with the testator, and Latini Iuniani could not be thus appointed, Gaius i. 24. It would seem that a testamentary guardian could at one time decline the office, or even lay it down after acceptance, Ulpian, Reg. 11. 17: this right is not mentioned in Justinian, which marks the transition from the conception of tutela as a right to that of a munus publicum. For the formulae by which testamentary guardians were appointed see Gaius i. 149; for the effect of placing such appointment before the institution of the heir, Gaius ii. 231: cf. Tit. 14. 3 inf. A testamentary guardian might be appointed by codicils testamento confirmati, Dig. 26. 2. 3: ib. 8 pr.

§ 4. Postumi liberi are children born after the execution of the will: whether after the death of the testator or in his life-time is immaterial. A paterfamilias could not give a testamentary guardian to a posthumous grandson, if, supposing he had died immediately after the execution of the will, the grandson would have been born in the potestas of his own father, the testator's son: for in that case, the father being in the same potestas, the child would not have been a suus heres to the testator. Guardianship was only intended as a substitute for patria potestas, and the existence of the latter barred the possibility of the former.

modo in ea causa sint, ut, si vivis parentibus nascerentur, sui
5 et in potestate eorum fierent. Sed si emancipato filio tutor a patre testamento datus fuerit, confirmandus est ex sententia praesidis omnimodo, id est sine inquisitione.

XIV

QUI DARI TUTORES TESTAMENTO POSSUNT

Dari autem potest tutor non solum pater familias, sed
1 etiam filius familias. Sed et servus proprius testamento cum libertate recte tutor dari potest. sed sciendum est eum et sine libertate tutorem datum tacite et libertatem directam accepisse videri et per hoc recte tutorem esse. plane si per

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§ 5. There were five other cases in which magisterial confirmation of a testamentary appointment was required, viz. (1) where a father gave by will a guardian to his natural child, Dig. 26. 3. 7 ; (2) where the appointment was made in unconfirmed codicils or in an invalid will, Dig. ib. 1. 1 ; (3) where the appointment violated the SC. Libonianum by being written by the guardian himself ; here a 'praevia inquisitio' was necessary, Dig. 26. 2. 29 : 48. 10. 18. 1 ; (4) where a mother attempted to give a testamentary guardian to her child, the appointment would be confirmed only 'ex inquisitione', and only if the child were instituted heir in the will, Dig. 26. 3. 2 ; (5) if a man appointed a testamentary guardian to the child of some other person, the appointment would be confirmed ex inquisitione if the child were instituted heir in the will, and had no other property, Dig. ib. 4. 5. In all these cases, or at any rate where an inquisitio was held, the appointment was deemed magisterial rather than testamentary, Dig. 26. 2. 26. 2 : 48. 10. 18. 1.

Tit. XIV. The two main rules of testamentary appointments are, (1) there must be testamentifactio (Bk. ii. 19. 4 inf.) between testator and the intended guardian, Dig. 26. 2. 21, and (2) the person must be clearly specified, Bk. ii. 20. 27 inf.

§ 1. Ulpian (Dig. 26. 2. 10. 4) and Paulus (Dig. ib. 32. 2) both say that the appointment of a slave of the testator's as tutor implied a gift of freedom. But this was not so if the slave was instituted heir until Justinian's own time, Tit. 6. 2 supr., Cod. 6. 27. 5. 1.

The words 'libertatem directam' are possibly a reference to Dig. 26. 2. 28. 1 'verbis fidei commissi manumissus non iure tutor testamento datur'. But it seems doubtful whether this was really the law : see Cod. 7. 4. 10 Dig. 26. 2. 10. 4.

Ulpian says in Dig. 26. 2. 10. 4 that even an unconditional (pure) appointment of another man's slave as testamentary guardian implied the condition 'cum liber erit', and a gift of fideicommissaria libertas 'si voluntas apertissime non refragetur'. It seems impossible to reconcile this with the text.

errorem quasi liber tutor datus sit, aliud dicendum est. servus autem alienus pure inutiliter datur testamento tutor: sed ita 'cum liber erit' utiliter datur. proprius autem servus inutiliter eo modo datur tutor. Furiosus vel minor viginti quinque annis 2
tutor testamento datus tutor erit, cum compos mentis aut maior viginti quinque annis fuerit factus.

Ad certum tempus et ex certo tempore vel sub condicione 3
vel ante heredis institutionem posse dari tutorem non dubitatur. Certae autem rei vel causae tutor dari non potest, quia 4
personae, non causae vel rei datur.

Si quis filiabus suis vel filiis tutores dederit, etiam postumae 5
vel postumo videtur dedisse, quia filii vel filiae appellatione et postumus et postuma continentur. quid si nepotes sint, an appellatione filiorum et ipsis tutores dati sunt? dicendum est,

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§ 2. Until the minor reached twenty-five or the lunatic recovered his senses, a tutor or curator would be appointed by the magistrate ad interim, Tit. 23. 5 inf.

§ 4. It is possible that the rule 'certae rei vel causae tutor dari non potest' is true only of testamentary appointments (cf. the analogy in institution: 'heredis institutio ex certa re inutiliter fit'): at any rate there are many cases in which a guardian was appointed certae causae, Gaius i. 150 'vel in omnes res, vel in unam forte aut duas optare', ib. 176 'ad hereditatem adeundam', ib. 178. 180 'dotis constituendae causa', Ulpian, Reg. 11. 22 'ad nuptias contrahendas', ib. 24 for a specific suit, cf. Tit. 21. 3 inf.: Fragm. Vat. 229, Dig. 26. 5. 9: 27. 1. 21. 2 and 4, Cod. 5. 62. 11: 5. 44. 3 and 4. Some passages even go so far as to suggest that the tutor was given rei rather than personae, 'non numerus pupillorum plures tutelas facit, sed patrimoniorum separatio' Dig. 27. 1. 3, 'non rebus duntaxat, sed etiam moribus' Dig. 26. 7. 12. 3. One explanation is that originally the guardian was appointed to the person and whole patrimony of the ward, but that gradually the practice grew up of allowing him to look after specific matters only; this being thought 'inelegans', and inconsistent with the true nature of the institution, was discouraged, and the later lawyers inclined to support the rule stated in the text, treating the charge of specific matters as cura rather than tutela; cf. Tit. 21. 3 inf. 'non praetorius tutor, ut olim, sed curator in eius locum datur', Tit. 23. 2 'curator enim et ad certam causam dari potest'. It cannot, however, be inferred from the word 'personae' that the guardian's main duty was the maintenance and education of the pupil: for this is absolutely untrue of the tutela mulierum, and even with impuberes he had, generally speaking, nothing to do with the child's education, which was managed by the nearest relatives under magisterial supervision: the tutor had only to provide the means in proportion to the pupil's property, as determined by the magistrate.

ut ipsis quoque dati videantur, si modo liberos dixit. ceterum si filios, non continebuntur: aliter enim filii, aliter nepotes appellantur. plane si postumis dederit, tam filii postumi quam ceteri liberi continebuntur.

XV

DE LEGITIMA ADGNATORUM TUTELA

G. i. 155. **Quibus** autem **testamento tutor datus non sit, his ex lege duodecim tabularum adgnati sunt tutores, qui vocantur**
G. i. 156. 1 **legitimi. Sunt autem adgnati per virilis sexus cognationem coniuncti, quasi a patre cognati, veluti frater eodem patre natus, fratris filius neposve ex eo, item patruus et patrui filius neposve ex eo. at qui per feminini sexus personas cognatione iunguntur,**

Tit. XV. Agnates are also defined in Bk. iii. 2. 1, from which we may apply here too the rule 'non tamen omnibus simul adgnatis dat lex hereditatem (tutelam), sed iis qui tunc proximiore gradu sunt cum certum esse coeperit aliquem intestatum decessisse', for which cf. also Tit. 16. 7 inf. The definition, to be made perfectly accurate, requires both extension and restriction. It must be extended so as to include (1) adoptive relations, e. g. brothers and uncles: for these cannot properly be said to be cognati at all if cognates are persons related naturali iure, by the tie of blood: and (2) women who by passing in manum came to be filiae loco to their husbands, and thus (by a process analogous to adoption) became agnates to their own children and to their husbands' agnates in general. It must, on the other hand, be restricted so as to exclude cognates who, even though per virilis sexus personas coniuncti, had by capitis deminutio left their (agnatic) family. This last error of Gaius' and Justinian's definition is avoided by Ulpian, Reg. 11. 4, who adds 'eiusdem familiae'. Agnates, in fact, are persons related to one another through males, whether the relationship be natural, adoptive, or quasi-adoptive as produced by manus, and between whom no barrier has been interposed by capitis deminutio; and agnation is the tie between two or more persons which is based on the potestas or manus to which all of them would be subject if the head of the familia were still alive: see Maine, Ancient Law, pp. 146–8. For the reason why the descendants of a woman were not agnates of her blood relations see on Tit. 9. 3 supr.

The praetorian changes in the law of intestate succession (between which and the tutela legitima there was such an intimate connection) were not accompanied by corresponding changes in the law of guardianship. By Nov. 118. c. 4 and 5, Justinian revolutionized the former branch of law by substituting title by cognation for title by agnation, and modified the law of guardianship in accordance therewith, cognatic relationship alone in future conferring a claim to tutela legitima.

non sunt adgnati, sed alias naturali iure cognati. itaque amitae tuae filius non est tibi adgnatus, sed cognatus (et invicem scilicet tu illi eodem iure coniungeris), quia qui nascuntur patris, non matris familiam sequuntur. Quod 2
autem lex ab intestato vocat ad tutelam adgnatos, non hanc habet significationem, si omnino non fecerit testamentum is qui poterat tutores dare, sed si quantum ad tutelam pertinet intestatus decesserit. quod tunc quoque accidere intellegitur, cum is qui datus est tutor vivo testatore decesserit. Sed 3 G. i. 158.
adgnationis quidem ius omnibus modis capitis deminutione plerumque perimitur: nam adgnatio iuris est nomen. cognationis vero ius non omnibus modis commutatur, quia civilis ratio civilia quidem iura corrumpere potest, naturalia vero non utique.

XVI

DE CAPITIS MINUTIONE

Est autem capitis deminutio prioris status commutatio. G. i. 159.
eaque tribus modis accidit: nam aut maxima est capitis deminutio aut minor, quam quidam mediam vocant, aut

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§ 3. This passage is borne out by Bk. iii. 1. 11 inf. 'naturalia enim iura civilis ratio perimere non potest', but (as is observed by Mr. Poste on Gaius i. 158) is almost completely contradicted by Tit. 16. 6 inf., which expressly (and truly) says that the two higher kinds of capitis deminutio destroyed naturalia iura based on cognatio no less than civilia iura based on adgnatio.

Tit. XVI. By status, in a general sense, the Romans denote a man's position in respect of legal rights, and this is usually determined by reference to three 'momenta', libertas, civitas, and familia, the importance of which in this connection was so great that they came to be regarded as specific status themselves, cf. p. 86 supr. Hence the dictum that no man can have a status unless, to begin with, he is free; and the statement of Paulus, servile caput nullum ius habet, practically adopted in § 4 inf., is amplified by Modestinus, Dig. 4. 5. 4, who adds, 'hodie enim incipit statum habere:' a slave, until he is manumitted, has no more a 'status' than he has a 'ius' or 'caput'. It is in this specific sense that status is used here: by defining capitis deminutio as prioris status commutatio Justinian means that when a man 'capite minuitur' he either (1) loses the freedom which he possessed before, or (2) though retaining his freedom, ceases to be a citizen of Rome, or finally (3) while remaining liber and civis, ceases to belong to the familia of which he has hitherto been a member. Similarly caput, in the expression capitis deminutio, bears a close analogy to status

G.i.160. 1 minima. **Maxima est capitis deminutio, cum aliquis simul et civitatem et libertatem amittit.** quod **accidit** in his, qui servi poenae efficiuntur atrocitate sententiae, vel liberti ut ingrati circa patronos condemnati, vel qui ad pretium par-
G.i.161. 2 ticipandum se venumdari passi sunt. **Minor sive media est capitis deminutio, cum civitas** quidem **amittitur, libertas** vero **retinetur. quod accidit ei, cui aqua et igni interdictum fuerit,**
G.i.162. 3 vel ei, qui in insulam deportatus est. **Minima est capitis deminutio, cum et civitas et libertas retinetur, sed status**

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in this specific sense: it means the rights a man enjoys in virtue of being free, or a civis, or a member of a family: by being 'capite deminutus' he loses some or all of these rights.

§ 1. For some modes of capitis deminutio maxima which were obsolete in Justinian's time see Tit. 3. 4 supr.: to them may be added surrender by the pater patratus to a foreign state for an offence against International Law, Livy 5. 36. For the cases mentioned here in the text see the note referred to.

§ 2. For deportatio and aquae et ignis interdictio see on Tit. 12. 1 supr. Capitis deminutio media occurred also when a Roman citizen became civis of another town, e.g. a civitas peregrina or a Latin colony, between which and Rome there was not a complete community of civil rights, Cic. pro Balbo 11. 12, pro Caec. 33. 34, de Orat. 1. 40. In his note on Gaius i. 161 Mr. Poste supposes that there was a capitis deminutio media when a Latinus was degraded to peregrinus by interdiction or deportation, but the evidence seems to show that the notion of capitis deminutio was never applicable to any persons except Roman citizens.

§ 3. The essence of capitis deminutio minima is the leaving, by the minutus, of his previous agnatic family. It is defined in this passage (which is taken from Gaius i. 162) as a status commutatio, a change of status unaccompanied by any loss of liberty or citizenship. Similarly Paulus says in Dig. 4. 5. 11 'cum et libertas et civitas retinetur, familia tantum mutatur, minimam esse capitis deminutionem constat', ib. 3 'liberos, qui adrogatum parentem sequuntur, placet minui caput, quum in aliena potestate sunt, et quum familiam mutaverint', ib. 7 'tutelas etiam non amittit capitis minutio: sed legitimae tutelae ex duodecim tabulis intervertuntur eadem ratione, qua et hereditates exinde legitimae, quia adgnatis deferuntur, qui desinunt esse familia mutati'; cf. 'minima capitis deminutio est, per quam et civitate et libertate salva status *duntaxat* hominis mutatur' Ulpian, Reg. 11. 13. The practical coincidence of Gaius and Ulpian with Paulus in describing capitis deminutio minima as a mere change, and not necessarily a change for the worse, involving a degradation, and the fact that they differ from him only in being less clear and emphatic in their definition, is noteworthy, because writers who take a different view upon this subject from that here adopted

hominis commutatur. quod accidit in his, qui, cum sui iuris fuerunt, coeperunt alieno iuri subiecti esse, vel contra. Servus **4** autem manumissus capite non minuitur, quia nullum caput habuit. Quibus autem dignitas magis quam status permutatur, **5**

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contend that Paulus is the only jurist by whose writings the latter is supported.

In the law of Justinian's time, then, capitis deminutio minima occurred in the following cases: (1) where a person sui iuris became alieni iuris by adrogatio or legitimatio. It may be objected that a person who is adrogated or legitimated may stand by himself in the world, and therefore have no familia to leave: but to this it may be replied that the Roman law regarded such a person as having a familia in virtue of his capacity to create one by marrying and begetting children, '. . . idemque eveniet et in eo qui emancipatus est: nam et hic sui iuris effectus propriam familiam habet' Dig. 50. 16. 195. 2. (2) Where a person alieni iuris entered a new family, e. g. the filiusfamilias given in adoptio plena, and the children of an adrogatus of legitimatus. (3) Where a person alieni became sui iuris by emancipation. For a discussion of another view upon this subject see Excursus I at the end of Book I, and for the effect of capitis deminutio minima on adrogatus' property, debts, &c. see Bk. iii. 10. 3 and notes inf.

§ 5. So status and dignitas are distinguished by Ulpian in Dig. 1. 5. 20 'qui furere coepit, et statum et dignitatem in qua fuit et magistratum et potestatem videtur retinere, sicut rei suae dominium retinet.'

Every Roman citizen was held in virtue of his citizenship to possess a certain dignity called his existimatio, which remained untarnished and unimpaired so long as he did nothing to incur reproach from his fellow burghers, but which was capable of being either entirely destroyed or partially lost: 'existimatio est dignitatis illaesae status, legibus ac moribus comprobatus, qui ex delicto nostro auctoritate legum aut minuitur aut consumitur' Dig. 50. 13. 5. 1. Existimatio was said to be 'consumed' if its foundation, the civitas, were forfeited by either maxima or media capitis deminutio, Dig. 50. 13. 5. 3. In other cases, where a man had been guilty of such conduct as was held to justify a deprivation of some portion of his civil rights and privileges, he was said to be branded with ignominia or nota, and his existimatio to be 'diminished': 'minuitur existimatio quotiens manente libertate circa statum dignitatis poena plectimur, sicuti cum relegatur quis, vel cum ordine movetur, vel cum prohibetur honoribus publicis fungi, vel cum plebeius fustibus caeditur, vel in opus publicum datur, vel cum in eam causam quis incidit, quae edicto perpetuo infamiae causa enumeratur' Dig. 50. 13. 5. 2. The oldest form of minutio existimationis can be traced back to an enactment probably comprised in the XII Tables, which declared citizens who committed certain crimes improbi and intestabiles: 'cum lege quis intestabilis iubetur esse, eo pertinet, ne eius testimonium recipiatur, et eo amplius, ut quidam putant, neve ipsi dicatur testimonium' Dig. 28 1. 26. Simi-

capite non minuuntur: et ideo senatu motos capite non minui constat.

6 Quod autem dictum est manere cognationis ius et post capitis deminutionem, hoc ita est, si minima capitis deminutio interveniat: manet enim cognatio. nam si maxima capitis deminutio incurrat, ius quoque cognationis perit, ut puta servitute alicuius cognati, et ne quidem, si manumissus fuerit, recipit cognationem. sed et si in insulam deportatus quis sit,
G.i.164. 7 cognatio solvitur. **Cum autem ad adgnatos tutela pertineat, non simul ad omnes pertinet, sed ad eos tantum, qui proximo gradu sunt**, vel, si eiusdem gradus sint, ad omnes.

XVII

DE LEGITIMA PATRONORUM TUTELA

G. i. 165. **Ex eadem lege duodecim tabularum libertorum et libertarum tutela ad patronos liberosque eorum pertinet, quae et ipsa legitima tutela vocatur: non quia nominatim ea lege de hac tutela cavetur, sed quia perinde accepta est per interpretationem, atque si verbis legis introducta esset. eo enim ipso, quo hereditates libertorum libertarumque, si intestati**

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larly a man's existimatio was affected, though perhaps less permanently, by the subscriptio or nota censoria, for which see General Introd. p. 21. The commonest cause of minutio, however, was infamia, an institution doubtless known to the old civil law, but which, as may be gathered from the passage cited supr. from the Digest, was raised to an honourable prominence by the care with which the praetor used it as an instrument or morality and justice. The Edict did not directly inflict infamia: the catalogue of infames attributed to it in Dig. 3. 2. 1 has been shown by Lenel to be merely one of persons 'qui prohibentur pro alio postulare &c', and this is expressly confirmed by Gaius iv. 182. For a discussion of the question whether infamia ever operated as a capitis deminutio see Mr. Poste's note on Gaius i. 161: cf. Greenidge, Infamia, p. 6.

Tit. XVII. Where a libertus civis died intestate, having no suus heres (the meaning of intestati in the text), the patron took his property as (by a fiction) his nearest agnate, and the tutela went in the same way on the analogy of the legitima adgnatorum tutela. But when a Latinus Iunianus (who could neither have a suus heres nor make a will) died, the patron took the property by a different title, iure peculii (Bk. iii. 7. 4 inf.). Hence the succession and the tutela did not necessarily go together: 'unde si ancilla ex iure Quiritium tua sit, in bonis mea, a me quidem solo, non etiam a te manumissa, Latina fieri potest, et bona eius ad me pertinent, sed eius tutela tibi competit: nam ita lege Iulia cavetur' Gaius i. 167.

decessissent, iusserat lex ad patronos liberosve eorum pertinere, crediderunt veteres voluisse legem etiam tutelas ad eos pertinere, cum **et adgnatos, quos ad hereditatem** vocat, **eosdem** et **tutores esse iussit** et quia plerumque, ubi successionis est emolumentum, ibi et tutelae onus esse debet. ideo autem diximus plerumque, quia, si a femina impubes manumittatur, ipsa ad hereditatem vocatur, cum alius est tutor.

XVIII

DE LEGITIMA PARENTIUM TUTELA

Exemplo patronorum recepta est et alia tutela, quae et ipsa G. i. 166. **legitima vocatur. nam si quis filium** aut filiam, **nepotem** aut neptem **ex filio et deinceps impuberes** emancipaverit, **legitimus eorum tutor erit.**

XIX

DE FIDUCIARIA TUTELA

Est et **alia tutela, quae fiduciaria appellatur.** nam si parens G. i. 166[a]. filium vel filiam, nepotem vel neptem et deinceps impuberes

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This is another exception to the rule here stated by Justinian, 'plerumque ubi successionis est emolumentum, ibi et tutelae onus esse debet.' If a free person in mancipio were manumitted while impubes by his superior, there having been no fiducia (note on Tit. 12. 6 supr.) between the latter and the father, the superior became patronus, and thus tutor legitimus. For some remarks on the 'interpretatio' of the XII Tables and other old statutes see General Introd. p. 43 supr.

Tit. XVIII. It does not seem that any express statute had conferred on the parens manumissor the tutela of children whom he emancipated while impuberes. It is said 'vicem legitimi tutoris sustinet' Dig. 26. 4. 3. 10, 'legitimus tutor habetur' Gaius i. 172; the latter stating as the reason 'quia non minus huic quam patronis honor praestandus est.'

Tit. XIX. Tutores fiduciarii are the male agnatic children of the parens manumissor, Gaius i. 175. As long as the old form of emancipation was in use the term was also applied to the extraneus manumissor, i. e. the person into whose mancipium the coemptionator or pater had conveyed the woman or child in power with the fiducia 'ut manumittatur', and (on his death) to his male agnatic descendants proximiore gradu, Gaius i. 166, Ulpian, Reg. 11. 5. As Justinian expressly enacted that the father who emancipated a child in the new form introduced by him should have precisely the same rights as the old parens manumissor (Bk. iii. 2. 8 inf.), the legitima parentium tutela and the tutela fiduciaria of the parens manu-

manumiserit, legitimam nanciscitur eorum tutelam: quo defuncto si liberi virilis sexus extant, fiduciarii tutores filiorum suorum vel fratris vel sororis et ceterorum efficiuntur. atqui patrono legitimo tutore mortuo, liberi quoque eius legitimi sunt tutores: quoniam filius quidem defuncti, si non esset a vivo patre emancipatus, post obitum eius sui iuris efficeretur nec in fratrum potestatem recideret ideoque nec in tutelam, libertus autem si servus mansisset, utique eodem iure apud liberos domini post mortem eius futurus esset. ita tamen ii ad tutelam vocantur, si perfectae aetatis sint. quod nostra constitutio generaliter in omnibus tutelis et curationibus observari praecepit.

XX

DE ATILIANO TUTORE VEL EO QUI EX LEGE IULIA ET TITIA DABATUR

G. i. 185. **Si cui nullus omnino tutor** fuerat, **ei** dabatur **in urbe** quidem **Roma a praetore urbano et maiore parte tribunorum plebis** tutor **ex lege Atilia, in provinciis vero a praesidibus**

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missor's children were untouched: nor were they affected by the reforms of Nov. 118, which introduced a legitima cognatorum tutela only as a substitute for the old tutela of the agnates.

Tit. XX. The business of appointing guardians to persons who required them, and who were not already provided, was not an ordinary function of any magistrate, and could therefore be exercised only in virtue of special statutory authorization: 'tutoris datio neque imperii est neque iurisdictionis, sed ei soli competit cui nominatum hoc dedit vel lex vel senatusconsultum vel princeps' Dig. 26. 1. 6. 2. The lex Atilia (the date of which was certainly earlier than 188 B. C., cf. Livy 39. 9) conferred this power, in the city of Rome, on the praetor urbanus acting in conjunction with the majority of the tribuni plebis (for other examples of joint action among the tribunes cf. Cic. in Verr. 2. 2. 41, Gellius 7. 19, Valerius Max. 6. 1. 7. 5. 4); by the lex Iulia et Titia B. C. 31 it was extended to the praesides of provinces within their respective jurisdictions. Guardians thus appointed were called dativi, a term applied by Gaius (i. 154) and Ulpian (Reg. 11. 14) to those appointed in a testament. Under Justinian they were thus given in the following cases: (1) When there was no other tutor, testamentary, statutory, or fiduciary. (2) When the person to whom the tutela naturally belonged was excluded by an 'excusatio necessaria', or had some valid ground for exemption, Gaius i. 182, Ulpian, Reg. 11. 23. (3) The cases referred to in § 1 of this Title. (4) Where a tutor was incapacitated, acquired a ground of excuse, or was removed on suspicion

provinciarum ex lege Iulia et Titia. Sed et **si testamento** 1 G.i.186.
tutor sub condicione aut die certo datus fuerat, **quamdiu**

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after actually entering on his functions: but if a testamentary guardian died, or was capite minutus, the tutela devolved on the legitimi, Dig. 26. 2. 11. 3 and 4. (5) In one or two cases where an exception was allowed to the rule tutorem habenti tutor non datur, viz. (*a*) if there were several testamentary guardians of whom one died or was capite minutus a substitute was given by the magistrate, Dig. 26. 2. 11. 4; (*b*) where the tutor legitimus was a minor, deaf, dumb, insane, or absent: for a case obsolete under Justinian see Tit. 21. 3 inf.

§ 1. When the effect of a disposition is made to depend on the occurrence or non-occurrence of some uncertain event in the future, even where that event is the ascertainment of some past or present fact, it is said to depend on a condition: where it is an occurrence, the condition is positive or affirmative: where a non-occurrence, it is negative. It may depend on a condition in two ways; a man may say, 'my disposition shall not take effect unless so and so occurs,' in which case the condition is suspensive; or, 'my disposition shall take effect at once, but that effect shall be stopped and cancelled if so and so occurs,' in which case the condition is resolutive. The importance of the latter class is mainly in relation to dispositions involving a transfer of property, in particular to the law of sale: the condition referred to in the text is suspensive. Some dispositions were by the Roman law completely void if made to depend on a condition or dies (for which see below); 'actus legitimi, qui non recipiunt diem vel condicionem, velut emancipatio, acceptilatio, hereditatis aditio, servi optio, datio libertatis, in totum vitiantur per temporis vel condicionis adiectionem' Dig. 50. 17. 77. When the condition was satisfied or fulfilled, it was said, condicio existit: when it was certain that it had not been fulfilled, condicio deficit. Negative conditions are fulfilled when the fact or event whose non-occurrence is contemplated has become impossible; and in some cases a condition was regarded as fulfilled when in point of fact it had not been: (1) 'iure civili receptum est, quotiens per eum, cuius interest condicionem non impleri, fiat quominus impleatur, perinde haberi ac si impleta condicio fuisset' Dig. 50. 17. 161. (2) If the fulfilment of the condition is prevented by some other person's arbitrarily refusing consent or co-operation, 'plerumque haec condicio, si uxorem duxerit, si dederit, si fecerit, ita accipi oportet, quod per eum non stet, quominus ducat, det aut faciat' Dig. 28. 7. 23: or if the person entitled on fulfilment is prevented from fulfilling by other accidental circumstances.

As regards the effect of a condition annexed to a disposition:

(*a*) If suspensive, the disposition, until it is fulfilled, is there and in existence, and does not come into existence only on its fulfilment: accordingly, it may have legal consequences even though, through failure of the condition, it is subsequently annihilated: e.g. a second will, in which the heir is instituted conditionally, revokes a prior one, even though the

condicio aut dies pendebat ex isdem legibus **tutor dari** poterat. **item si pure datus fuerit, quamdiu nemo** ex testamento **heres**

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condition is never fulfilled and the will as a whole thus never takes effect, Dig. 28. 3. 16. But rights conferred by the disposition are merely conditional, and can have no practical effect until the condition is fulfilled: speaking precisely, there is only a chance of having the right, which chance by the fulfilment of the condition becomes an actuality: a contingent becomes a vested right. Cf. the note on Bk. iii. 15. 4.

(*b*) If resolutive, the disposition has presently all the effects which it would have, had it been unconditional, though these are liable to be cancelled and rendered null by the future fulfilment of the condition.

On the fulfilment of a suspensive condition, the disposition which has hitherto been conditional becomes unconditionally operative, and its operation is carried back to the time at which it was made: 'cum enim semel condicio extitit, perinde habetur ac si illo tempore, quo stipulatio interposita est, sine condicione facta esset' Dig. 20. 4. 11. 1: this rule is expressed in the formula 'condicio existens ad initium negotii retrotrahitur'. On the fulfilment of a resolutive condition, the whole effect of the disposition is nullified, the condition operating retrospectively so as to place the parties as far as possible in the position in which they would have been had the disposition never been made; Dig. 6. 1. 41; 13. 7. 13 pr.; 18. 2. 4. 3. For the effect of impossible conditions see on Bk. ii. 14. 10 inf. and cf. Bk. iii. 19. 11.

By dies, in connection with dispositions, is meant the fixing of a time, which may mark either (*a*) the commencement of a right: (*b*) its termination: or (*c*) both its termination and commencement, i.e. its duration: 'vel ex die incipit obligatio aut confertur in diem: ex die, veluti Kalendis Martiis dare spondes? in diem autem, usque ad Kalendas Martias dare spondes?' Dig. 44. 7. 44. 1 (the language in Bk. iii. 15. 2 inf. differs from this and is inaccurate). The dies may be limited by express reference to the calendar (dies certus) or to some event certain to happen, though when it will actually happen is uncertain: e.g. (as in wills) 'after my death', or 'a year after my death' (dies incertus quando): finally dies and condicio may be combined: e.g. 'three months after so and so shall happen, if it ever shall' (dies incertus an et quando). Dies ex quo may be described as suspensive, dies in quem as resolutive. In the latter, the disposition is completely operative, and has its full effect until the dies comes, after which it has no effect whatever: e.g. the grant of a usufruct till this day five years. In dies ex quo, on the other hand, the disposition has no jural effect until the dies arrives; 'dies adiectus efficit ne praesenti die debeatur' Dig. 45. 1. 41. 1. Still, it is certain that the jural effect will come into existence sooner or later; 'pecunia, quam in diem certum dari stipulamur . . . certum est eam debitum iri, licet post tempus petatur' Gaius iii. 124, cf. Dig. 7. 9. 9. 2; so that it is not improper to speak of the right as already existing as a vested right, though it may not be realized as yet in possession. It is this which distinguishes dies

existat, tamdiu ex isdem **legibus tutor petendus** erat, **qui** desinebat **tutor esse,** si condicio existeret aut dies veniret aut heres existeret. **Ab hostibus quoque tutore capto ex his** 2 G. i. 1 7.
legibus tutor petebatur, **qui** desinebat **esse tutor, si is qui captus** erat **in civitatem reversus** fuerat: **nam reversus recipiebat tutelam iure postliminii.** Sed ex his legibus pupillis 3
tutores desierunt dari, posteaquam primo consules pupillis utriusque sexus tutores ex inquisitione dare coeperunt, deinde praetores ex constitutionibus. nam supra scriptis legibus neque de cautione a tutoribus exigenda rem salvam pupillis fore neque de compellendis tutoribus ad tutelae administrationem quidquam cavetur. Sed hoc iure utimur, ut Romae 4
quidem praefectus urbis vel praetor secundum suam iurisdictionem, in provinciis autem praesides ex inquisitione tutores crearent, vel magistratus iussu praesidum, si non sint magnae

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from condicio: it does not, like the latter, leave it uncertain whether a legal relation will be established or not, but it fixes the relation, only postponing the time at which the right can be realized in action: see Bk. iii. 15. 2 inf. 'quod in diem (ex die ?) stipulamur, statim quidem debetur sed peti prius quam dies veniat non potest': so too Dig. 45. 1. 46 pr. 'centesimis Kalendis dari utiliter stipulamur, quia praesens obligatio est, in diem autem dilata solutio.' For other passages in which condicio and dies occur together see Bk. iii. 15. 2, ib. 16. 2, ib. 19. 5, ib. 26. 12, ib. 29. 3; Bk. iv. 6. 33 inf., and for the expression 'heres existere' see Bk. ii. 19. 5 inf.

§ 2. For 'postliminium' see on Tit. 12. 5 supr.

§ 3. The functions of the consuls in appointing tutors are alluded to in Fragm. Vat. 155: cf. Sueton. Claudius 23 'sanxit ut pupillis extra ordinem tutores a consulibus darentur'. The scope of the 'inquisitio' is explained by Theophilus, *εἰ εὔποροί εἰσιν . . . εἰ χρηστὸν ἔχουσι βίον, ἢ δυνάμενοι διοικεῖν ἀλλοτρίαν περιουσίαν*. Subsequently a special praetor tutelaris was established for the purpose by M. Aurelius: 'praetorem tutelarem primus fecit, cum antea a consulibus poscerentur, ut diligentius de tutoribus tractaretur' Capitol. Marc. 10: the date of this change is fixed as about 161–9 A.D. by a tablet found in Venice. For the cautio given by tutors see Tit. 24 inf.

§ 4. 'Secundum suam iurisdictionem' is explained by the glossators thus: 'iurisdictio eorum est haec: ut puta a patriciis usque ad illustres praefectus urbi tutores dat, ab illustribus usque ad inferiores praetor.' But it seems just as probable that the praetor's functions related only to pupilli whose property fell below a certain maximum value—possibly 500 solidi: at least (§ 5) municipal magistrates in the provinces were authorized to appoint when the pupil's fortune was less than this.

5 pupilli facultates. Nos autem per constitutionem nostram et huiusmodi difficultates hominum resecantes nec exspectata iussione praesidum disposuimus, si facultas pupilli vel adulti usque ad quingentos solidos valeat, defensores civitatum una cum eiusdem civitatis religiosissimo antistite vel apud alias publicas personas, id est magistratus, vel iuridicum Alexandrinae civitatis tutores vel curatores creare, legitima cautela secundum eiusdem constitutionis normam praestanda, videlicet eorum periculo qui eam accipiant.

G.i.189. 6 **Impuberes** autem **in tutela esse naturali** iure **conveniens est, ut is qui perfectae aetatis non sit alterius tutela regatur.**

G.i.191. 7 Cum igitur **pupillorum pupillarumque tutores negotia** gerunt, **post pubertatem tutelae iudicio rationem reddunt.**

XXI

DE AUCTORITATE TUTORUM

Auctoritas autem tutoris in quibusdam causis necessaria pupillis est, in quibusdam non est necessaria. ut ecce si quid

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§ 5. The reference is to Cod. 1. 4. 30. The iuridicus of Alexandria received the power of appointing tutors from M. Aurelius, Dig. 1. 20: cf. Cod. 1. 57; magistrates of the same name exercised the same functions in Italy (Capitol. Marc. 11) and perhaps elsewhere, Apul. Metam. 1. 5, but they seem to have been extinct before the time of Justinian.

§ 6. See on Tit. 13. 1 supr.

§ 7. For 'negotia gerere' see the note last referred to. On the ward's attaining the age of puberty the tutor could be compelled by the actio tutelae directa to lay before him full accounts of his income and expenditure for the years during which he had administered the property (cf. note on Bk. iii. 27. 2 inf.): condemnation entailed infamia, Bk. iv. 16. 2 inf. Where the charge was one of conversion to his own use the proper remedy was the actio de rationibus distrahendis, a penal action dating from the XII Tables, Cic. de Off. iii. 15 pr. and 6, by which double damages could be recovered, Dig. 26. 7. 55. 1: 27. 3. 1. 19.

Tit. XXI. The administration of property in general is carried on by dispositions such as alienation, contract, release, and so forth; but the functions of a tutor relate in the main only to acts or dispositions by which the ward's property might be diminished: with an act of the ward by which he is merely enriched the tutor need have nothing to do. The most important acts of the former class are alienation and contract: these might ('si procuratorem recipiebant') be the acts of the tutor alone: but if the actus were legitimus the ward must act in person. But whenever the latter attempted to make a disposition by which his proprietary

dari sibi stipulentur, non est necessaria tutoris auctoritas: quod si aliis pupilli promittant, necessaria est: namque placuit meliorem quidem suam condicionem licere eis facere etiam sine tutoris auctoritate, deteriorem vero non aliter quam tutore auctore. unde in his causis, ex quibus mutuae obligationes nascuntur, in emptionibus venditionibus, locationibus conductionibus, mandatis, depositis, si tutoris auctoritas non interveniat, ipsi quidem qui cum his contrahunt obligantur, at invicem pupilli non obligantur. Neque tamen hereditatem 1
adire neque bonorum possessionem petere neque hereditatem ex fideicommisso suscipere aliter possunt nisi tutoris auctoritate, quamvis lucrosa sit neque ullum damnum habeat.

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position might be prejudiced, it could confer no rights on other parties unless the tutor 'auctoritatem suam interposuit': it was this alone that gave the act a full legal character: 'tutoris auctoritas necessaria . . . si lege aut legitimo iudicio agant, si se obligent, si civile negotium gerant (e. g. hereditatis aditio, note on § 1) si rem mancipi alienent . . . etiam in rerum nec mancipi alienatione tutoris auctoritate opus est' Ulpian, Reg. 11. 27. There were in fact only three cases in which a pupil could be sued on an act of his own which had not been sanctioned by his tutor: (1) for his own delict, Dig. 9. 2. 5. 2; (2) si actio ex re venit, i.e. where the obligation is merely one of restitution, Dig. 44. 7. 46: 13. 6. 3; and (3) where and so far as he had been enriched by the transaction, Dig. 26. 8. 5 pr. There is also considerable authority for saying that the contract of a pupillus infantia maior bound him naturaliter even though not authorized by the guardian: cf. with iii. 29. 3 inf. Dig. 46. 2. 1. 1: 12. 42 pr.: 46. 3. 44, ib. 95. 4: 39. 5. 19. 4: 36. 1. 66 pr. If this view is correct we must supply a word in the last sentence of this section, and understand it 'at invicem pupilli [civiliter] non obligantur'. But other passages besides the text above say that no obligation whatever arose from the unauthorized promise of a pupillus: e.g. Dig. 26. 8. 9 pr.: 16. 1. 8. 15: Cod. 8. 39. 1. The commentators take different views of the antinomy, some believing in the superior authority of the passages first cited, others in that of those last referred to, and others attempting to reconcile them. See the writer's Contract of Sale in the Civil Law, pp. 11–15.

§ 1. The reason of the rule here stated is that hereditas, bonorum possessio, and hereditas fideicommissaria always comprised liabilities as well as rights, and though the latter might more than outbalance the former, yet on the general principle the pupil could incur no liability by contract whatever without his tutor's auctoritas: cf. Seneca, Nat. Quaest. 2. 49, Dig. 29. 2. 8 pr. The aditio of an inheritance had always been an actus legitimus, an act which by law was required to be personally performed, and which consequently could not be undertaken by the tutor alone on

2 Tutor autem statim in ipso negotio praesens debet auctor fieri, si hoc pupillo prodesse existimaverit. post tempus vero
G. i. 184. 3 aut per epistulam interposita auctoritas nihil agit. **Si inter tutorem** pupillumve iudicium **agendum** sit, **quia ipse tutor in rem suam auctor esse non potest**, non **praetorius tutor** ut olim constituitur, sed curator in locum eius datur, quo interveniente iudicium peragitur et eo peracto curator esse desinit.

XXII

QUIBUS MODIS TUTELA FINITUR

G. i. 196. Pupilli pupillaeque **cum puberes esse coeperint, tutela liberantur.** pubertatem autem veteres quidem non solum ex annis, sed etiam ex **habitu corporis** in masculis aestimari volebant. nostra autem maiestas dignum esse castitate temporum nostrorum bene putavit, quod in feminis et antiquis impudicum esse visum est, id est inspectionem habitudinis corporis, hoc etiam in masculos extendere: et ideo sancta constitutione promulgata pubertatem in masculis post quartum decimum annum completum ilico initium accipere disposuimus, antiquitatis normam in feminis personis bene positam suo

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the pupil's behalf. In bonorum possessio, on the contrary, which being a praetorian institution was governed by more liberal rules, free representation was always permitted. By imperial enactment (Cod. 6. 30. 18. 2–4) the tutor was allowed to make aditio for the pupil without any co-operation on the latter's part.

§ 3. Suits in which a pupil was a party might be undertaken by the tutor alone, or by the pupil himself with the former's auctoritas: 'sufficit tutoribus ad plenam defensionem, sive ipsi iudicium suscipiant, sive pupillus ipsis auctoribus . . . ita tamen, ut pro his, qui fari non possint vel absint, ipsi tutores iudicium suscipiant, pro his autem, qui supra septimum annum aetatis sunt et praesto fuerint, auctoritatem praestent' Dig. 26. 7. 1. 2.

The suit between tutor and ward contemplated in the text is one arising out of other matters than the guardianship, e.g. a will or intestacy under which both claimed to succeed. For the tutor praetorius see Gaius i. 173–187, Cod. 5. 44, and note on Tit. 14. 4 supr.

Tit. XXII. The precise age at which a male pupillus became pubes had been disputed by the two schools of jurists: the Sabinians were in favour of determining it in each individual by reference to actual physical maturity, the Proculians of fixing fourteen years as the age in all cases: Javolenus Priscus inclined to combine both requirements, Ulpian

ordine relinquentes, ut post duodecimum annum completum viripotentes esse credantur. Item finitur tutela, si adrogati 1
sint adhuc impuberes vel deportati: item si in servitutem pupillus redigatur vel ab hostibus fuerit captus. Sed et si 2
usque ad certam condicionem datus sit testamento, aeque evenit, ut desinat esse tutor existente condicione. Simili 3
modo finitur tutela morte vel tutorum vel pupillorum. Sed 4
et capitis deminutione tutoris, per quam libertas vel civitas eius amittitur, omnis tutela perit. minima autem capitis deminutione tutoris, veluti si se in adoptionem dederit, legitima tantum tutela perit, ceterae non pereunt: sed pupilli et pupillae capitis deminutio, licet minima sit, omnes tutelas

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Reg. 11. 28, Gaius i. 196. The constitution referred to by Justinian is in Cod. 5. 60. 3.

§ 1. The release of a pupillus from guardianship on being deportatus might be taken to support the theory that tutela was iuris civilis; see note on Tit. 13. 1 supr. If the ward was taken captive a curator was usually appointed to look after his property, on the chance of his restoration by postliminium, Dig. 4. 6. 15 pr.

§ 2. The office of a testamentary guardian, who was appointed subject to a resolutive condition or a dies in quem (§ 5 inf.), determined on the fulfilment of the condition or the arrival of the dies. So too if he were appointed by a magistrate certae rei vel causae, he ceased to be guardian as soon as the purpose for which he had been nominated was attained, Dig. 26. 2. 10, Cod. 5. 44.

§ 4. The tutela legitima of an agnate was extinguished by his undergoing capitis minutio minima, because thereby he lost his agnatic character, so that the whole reason for his being tutor in that particular case fell away. The legitima tutela of cognates was not destroyed by this event: 'ex novis autem legibus . . . tutelae plerumque sic deferuntur, ut personae naturaliter designentur' Dig. 4. 5. 7 pr. A tutor who lost his liberty by capture in war might recover his office iure postliminii, Tit. 20. 2 supr.

In Dig. 4. 5. 7 pr. Paulus writes 'tutelas autem non amittit capitis minutio, exceptis his quae in iure alieno personis positis deferuntur'. Literally, these words would seem to mean that the tutela exercised by a filiusfamilias (under a testament or magisterial appointment) was extinguished by cap. dim. minima: but this is contradicted by Dig. 27. 3. 11, which expressly says that emancipation did not have this effect. Consequently, the commentators have either restricted the sense of the passage to capitis deminutio by datio in adoptionem (though that this should destroy tutela seems quite unreasonable) or have attempted to correct the passage so as to make it refer only to agnatic guardianship. An explanation of this kind is given without any emendation by a scholiast,

5 tollit. Praeterea qui ad certum tempus testamento dantur
6 tutores, finito eo deponunt tutelam. Desinunt autem esse tutores, qui vel removentur a tutela ob id quod suspecti visi sunt, vel ex iusta causa sese excusant et onus administrandae tutelae deponunt secundum ea quae inferius proponemus.

XXIII

DE CURATORIBUS

Masculi puberes et feminae viripotentes usque ad vicesimum quintum annum completum curatores accipiunt: qui, licet puberes sint, adhuc tamen huius aetatis sunt, ut negotia

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who interprets the disputed words by saying τούτεστι τοῖς διαμείνασιν ὑπεξουσίοις μέχρι τῆς τοῦ πατρὸς τελευτῆς (hoc est, qui remanserunt in potestate usque ad mortem patris: i. e. the agnates).

Tit. XXIII. Cura, like tutela, was a munus publicum. A tutor's functions were partly of administration, partly of auctoritas: those of a curator related to administration only, so that he was not said, like the tutor, to be 'personae datus', and it is the auctoritatis interpositio which forms the characteristic difference between the two: 'si tutoris auctoritas fuerit necessaria . . . tutor ei necessario dabitur, quoniam curatoris auctoritas ad hoc inutilis est' Dig. 49. 1. 17. 1. The exact scope of the curator's administratio of course depended on the circumstances of the case: sometimes he entirely managed the ward's property: sometimes he allowed him practically to manage it himself, and here he took no personal part in the business, having no power to interpose auctoritas: but his consensus was presumed, and his responsibility in no way diminished: sometimes, as in the case of lunatics, he had charge of the ward's person also.

The cura of adulescentes or minors—i. e. persons between the ages of puberty and twenty-five years—originated in the lex Plaetoria, often mentioned by Plautus, who died B.C. 183, which subjected those who fraudulently overreached minors to a iudicium publicum entailing a pecuniary mulct and infamia on conviction, and also gave the minor a civil remedy against them, Dig. 41. 1. 7. 1. In the face of such a prosecution few people would be likely to give credit to minors or even to have any dealings with them whatsoever (Plautus, Pseudolus 1. 3. 68, Rudens, 5. 3. 24): hence the rule was established (it is uncertain whether by the praetor or by the statute itself: Capitolinus Marc. 10 is in favour of the latter view) that minors who wished to contract or deal with others should be compellable to receive a curator on their application, by whose assent to the transaction the penal consequences of the lex Plaetoria would be avoided. M. Aurelius ordained that any minor, apart from such special occasion, should be able to obtain from the praetor a general curator to undertake the general administration of his property. A further

sua tueri non possint. Dantur autem curatores ab isdem 1 magistratibus, a quibus et tutores. sed curator testamento non datur, sed datus confirmatur decreto praetoris vel praesidis. Item inviti adulescentes curatores non accipiunt 2 praeterquam in litem: curator enim et ad certam causam dari potest. Furiosi quoque et prodigi, licet maiores viginti 3

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protection afforded to minors against the consequences of their own inexperience or indiscretion was the praetorian practice of in integrum restitutio, for which see on Bk. iv. 6. 33 inf.

§ 1. Dio Cassius (44. 35) says that Julius Caesar appointed in his will ἐπιτρόπους to Augustus 'qui propter provectiorem aetatem curatores fuerint': these must have been magisterially confirmed. The reason why testamentary appointment of curators was never allowed was perhaps that in the earliest form of the institution (the cura of furiosi and prodigi) a causae cognitio was required in order to settle whether the person actually was furiosus and prodigus, and this would have seemed to admit an undue interference of the magistrate with testamentary power.

§ 2. This means only that a general curator could not be forced on a minor: but he could be compelled to have one temporarily, ad certam causam (1) in litem, as is observed in the text, for no judgment could be given against a minor unless the litigation were sanctioned by a curator, Dig. 42. 1. 45. 2: (2) that his tutor's accounts might be passed, Cod. 5. 31. 7: (3) when his debtor wished to discharge a debt and obtain a release, Dig. 4. 4. 7. 2: (4) if he wished to give himself in adrogation, Dig. 1. 7. 8.

Whether a minor who had a general curator could bind himself by contract without the latter's consent is disputed. The general rule, even as late as the time of Modestinus, seems to have been that he could, Dig. 45. 1. 101, but of course he could not be effectively sued without it. A rescript, however, of Diocletian and Maximian shows that a little later the rule had been altered (Cod. 2. 21. 3), a minor with a curator being put on a par with an interdicted prodigal. The same passage states that against a contract made without such consent he could get himself in integrum restitutus, and from Cod. 2. 24. 2 and 3 it appears that he could avail himself of the same remedy if he could show that even with it he had made any disposition detrimental to himself.

§ 3. The cura of furiosi and prodigi, which the XII Tables had given to the agnates, went doubtless on default of the latter to the Gentiles, on the analogy of intestate succession: Cic. de Invent. 2. 50, Varro, de Re Rust. 1. 2. Appointment by the magistrate does not seem to have superseded this legitima cura, which is often spoken of as still in existence ('eo (legitimo) cessante, aut non idoneo forsitan existente, ex iudiciali electione curatorem ei dare necesse fuerit' Cod. 5. 70. 7. 6; cf. Dig. 27. 10. 13): it was resorted to only when the legitimi failed. Contra Girard, 4th ed. p. 223.

quinque annis sint, tamen in curatione sunt adgnatorum ex lege duodecim tabularum. sed solent Romae praefectus urbis
G. i. 198. vel praetor **et in provinciis praesides** ex inquisitione eis dare
4 **curatores.** Sed et mente captis et surdis et mutis et qui morbo perpetuo laborant, quia rebus suis superesse non
5 possunt, curatores dandi sunt. Interdum autem et pupilli curatores accipiunt, ut puta si legitimus tutor non sit idoneus, quia habenti tutorem tutor dari non potest. item si testamento datus tutor vel a praetore vel a praeside idoneus non sit ad administrationem nec tamen fraudulenter negotia administrat, solet ei curator adiungi. item in locum tutorum, qui non in perpetuum, sed ad tempus a tutela excusantur, solent curatores dari.

6 Quodsi tutor adversa valetudine vel alia necessitate impeditur, quo minus negotia pupilli administrare possit, et pupillus vel absit vel infans sit, quem velit actorem periculo ipsius praetor vel qui provinciae praeerit decreto constituet.

The interdiction of prodigals had been a matter of customary law even before the XII Tables, Dig. 27. 10. 1 pr. The prodigus was subjected to cura on an application to that effect being made to the praetor by his near relations: the form of interdiction is given by Paulus, Sent. Rec. 3. 4 a. 7 'moribus per praetorem bonis interdicitur hoc modo: quando tua bona paterna avitaque nequitia tua disperdis liberosque tuos ad egestatem perducis, ob eam rem tibi ea re commercioque interdico'. Under the early law the office belonged to the agnates only if the prodigus had succeeded his father ab intestato, Ulpian, Reg. 12. 3. As to when furiosi and prodigi were released from cura cf. Dig. 27. 10. 1 pr. 'et tamdiu ambo erunt in curatione, quamdiu vel furiosus sanitatem vel ille (prodigus) sanos mores receperit: quod si evenerit, ipso iure desinunt esse in potestate curatorum.'

§ 4. By mente capti, as distinct from furiosi, is meant to be expressed imbecility or weakness of intellect, in contrast with actual insanity: synonymous terms are stultus, fatuus, insanus. Such persons can have curators given them on application, because they cannot manage their own affairs, or even be relied on in the selection of agents: for Paulus says (Sent. Rec. 4. 12. 9) 'caeco curator dari non potest, quia ipse sibi procuratorem instituere potest'.

§ 5. For the maxim 'tutorem habenti tutor dari non potest' see on Tit. 20 pr. supr.

§ 6. For the 'actor' mentioned in this section see Dig. 26. 7. 24 pr., ib. 32. 7; 26. 9. 6; 46. 8. 9.

XXIV

DE SATISDATIONE TUTORUM ET CURATORUM

Ne tamen pupillorum pupillarumve **et eorum, qui** quaeve G. i. 199
in curatione sunt negotia a tutoribus curatoribusve consu-
mantur aut deminuantur, curat praetor, ut et tutores et
curatores eo nomine satisdent. sed hoc non est perpetuum; G. i. 200.
nam tutores testamento dati satisdare non coguntur, quia
fides eorum et diligentia ab ipso testatore probata est: item
ex inquisitione tutores vel curatores dati satisdatione non
onerantur, **quia** idonei **electi sunt.** Sed et si ex testamento 1
vel inquisitione duo pluresve dati fuerint, potest unus offerre
satis de indemnitate pupilli vel adulescentis et contutori vel
concuratori praeferri, ut solus administret, vel ut contutor
satis offerens praeponatur ei, ut ipse solus administret. itaque
per se non potest petere satis a contutore vel concuratore suo,
sed offerre debet, ut electionem det contutori suo, utrum velit
satis accipere an satis dare. quodsi nemo eorum satis offerat,

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Tit. XXIV. The squandering of pupils' fortunes by their tutors is often dwelt upon by old writers: 'divitias . . . . ut ferme evenit, tutor imminuit' Apuleius Apol., 'multiformis plerumque perfidia tutorum' Symmach. Ep. 7. 65, 'cottidie suspecti tutores postulantur' Dig. 26. 10. 1 pr. Tutors and curators, with the exceptions mentioned in the text, had to give security 'rem pupilli salvam fore' Bk. iii. 18. 4 inf., their own engagement always being supported by sureties. It was a question whether the patron and his sons were exempted from satisdatio: the better view seems to have been that it depended on the circumstances of the particular case, Dig. 26. 4. 5. 1.

§ 1. Where there were several joint tutors or curators (1) the business might be entrusted specially to one of them, and that either by direction of the appointing testator or magistrate, or by mutual arrangement: the mode in which this last was settled is described in this section. The managing tutor or curator was then called tutor or curator gerens, the others honorarii: 'sunt quidam tutores, qui honorarii appellantur: sunt, qui rei notitiae gratia dicuntur: sunt, qui ad hoc dantur, ut gerant, et hoc vel pater adicit, ut unus puta gerat, vel voluntate tutorum uni committitur gestus, vel praetor ita decernit. Dico igitur, cuicunque ex tutoribus fuerit solutum, etsi honorariis—nam et ad hos periculum pertinet—recte solvi, nisi interdicta iis a praetore fuerit administratio: nam si interdicta est, non recte solvitur' Dig. 46. 3. 14. 1: cf. Dig. 26. 7. 3. 1. The tutores honorarii were responsible for the gerens' faults of commission and omission, and therefore had to keep an eye on his administration

si quidem adscriptum fuerit a testatore, quis gerat, ille gerere debet: quodsi non fuerit adscriptum, quem maior pars elegerit, ipse gerere debet, ut edicto praetoris cavetur. sin autem ipsi tutores dissenserint circa eligendum eum vel eos qui gerere debent, praetor partes suas interponere debet. idem et in pluribus ex inquisitione datis probandum est, id est ut maior pars eligere possit, per quem administratio fieret.

2 Sciendum autem est non solum tutores vel curatores pupillis et adultis ceterisque personis ex administratione teneri, sed etiam in eos qui satisdationes accipiunt subsidiariam actionem

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(cf. Bk. iii. 19. 20 inf.). (2) Each one might have been specially assigned to look after certain kinds of the ward's property, or his property in some specific locality; in this case he was, within his sphere of action, possessed of all the rights and subject to all the duties of a single guardian. (3) The administration might be undivided: in which case each had a complete right to manage the ward's affairs subject to his colleagues' right of veto, and the liability was joint throughout, even where loss was occasioned by the act or omission of a single member.

§ 2. When inferior magistrates appointed tutors or curators to persons whose fortunes fell below a certain minimum (Tit. 20. 4 supr.), they did so sine inquisitione, and therefore were bound to make the selected person give satisdatio in the usual manner. If they exacted insufficient security, they were made liable in person for all loss resulting from their negligence by a senatusconsult of Trajan, Cod. 5. 75. 5, and this liability was extended to their heirs by Antoninus Pius, Dig. 27. 8. 6. Higher magistrates who appointed ex inquisitione were never thus responsible, § 4 inf.

This title deals with only one of the modes in which persons in tutela or cura were secured against loss from the dishonesty or negligence of their tutors or curators. They were also protected (1) by the possibility of remotio, Tit. 26 inf. (2) By statutory restrictions on the tutor's or curator's powers, especially in respect of alienation: see on Tit. 13. 1 supr. (3) By a statutory hypothec over the tutor's or curator's whole property, which had certainly been established as early as the time of Constantine, Cod. 5. 37. 20. (4) By responsibility of other persons for the tutor or curator (in addition to his sureties and the appointing magistrate). These were the affirmatores, who had at the inquisitio borne witness to the character of the person appointed, and the nominatores, persons who proposed or suggested a tutor or curator in any particular case; this might happen (*a*) at the petitio tutoris. If a pupil had no tutor, anyone could apply for or suggest one, and some persons were bound to do this: e.g. the mother (Bk. iii. 3. 6 inf.), and other heirs presumptive ab intestato, under penalty, in default, of forfeiting their rights of succession if the pupil died impubes, Dig. 26. 6. 2. 2: also the

esse, quae ultimum eis praesidium possit afferre. subsidiaria autem actio datur in eos, qui vel omnino a tutoribus vel curatoribus satisdari non curaverint aut non idonee passi essent caveri. quae quidem tam ex prudentium responsis quam ex constitutionibus imperialibus et in heredes eorum extenditur. Quibus constitutionibus et illud exprimitur, ut, 3
nisi caveant tutores vel curatores, pignoribus captis coerceantur. Neque autem praefectus urbis neque praetor neque 4
praeses provinciae neque quis alius cui tutores dandi ius est hac actione tenebitur, sed hi tantummodo qui satisdationem exigere solent.

XXV

DE EXCUSATIONIBUS

Excusantur autem tutores vel curatores variis ex causis: plerumque autem propter liberos, sive in potestate sint sive emancipati. si enim tres liberos quis superstites Romae habeat vel in Italia quattuor vel in provinciis quinque, a tutela vel cura possunt excusari exemplo ceterorum munerum: nam et tutelam et curam placuit publicum munus esse. sed adoptivi liberi non prosunt, in adoptionem autem dati naturali patri prosunt. item nepotes ex filio prosunt, ut in locum patris succedant, ex filia non prosunt. filii autem superstites tantum ad tutelae vel curae muneris excusationem prosunt, defuncti non prosunt. sed si in bello amissi sunt, quaesitum est, an prosint. et constat eos solos prodesse qui in acie amittuntur: hi enim, quia pro re publica ceciderunt, in

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libertus, under a pecuniary penalty. (*b*) In cases where a man was appointed tutor or curator by a magistrate, he could usually procure exemption by suggesting some one better qualified (potioris nominatio) by reason of relationship. This right of nominatio was in many cases restricted (Fragm. Vat. 158, Paul. Sent. Rec. 2. 29 'qui potiores nominare non possunt'), and was altogether abolished by Justinian.

Tit. **XXV**. For the Eastern Empire Romae means Constantinople, and Italia Thrace, schol. Theoph. By 'ut in patris locum succedant' is meant that any number of grandchildren by one dead son count only as one, *ὅσοι δ' ἂν ὦσιν ἔγγονοι ἐξ ἑνὸς υἱοῦ, ἀντὶ ἑνὸς τέκνου ἀριθμοῦνται*, Dig. 27. 1. 2. 7. For the sentiment at the end of the section cf. Tyrtaeus, Carm. i. 1, iii. 31, Plautus, Capt. 3. 5. 32, Cic. pro Balbo 17. 21, Planc. 77, Seneca, Controv. 1. 8.

1 perpetuum per gloriam vivere intelleguntur. Item divus Marcus in semestribus rescripsit eum, qui res fisci administrat,
2 a tutela vel cura quamdiu administrat excusari posse. Item qui rei publicae causa absunt, a tutela et cura excusantur. sed et si fuerunt tutores vel curatores, deinde rei publicae causa abesse coeperunt, a tutela et cura excusantur, quatenus rei publicae causa absunt, et interea curator loco eorum datur. qui si reversi fuerint, recipiunt onus tutelae nec anni habent vacationem, ut Papinianus responsorum libro quinto scripsit:
3 nam hoc spatium habent ad novas tutelas vocati. Et qui potestatem aliquam habent, excusare se possunt, ut divus Marcus rescripsit, sed coeptam tutelam deserere non possunt.
4 Item propter litem, quam cum pupillo vel adulto tutor vel curator habet, excusare se nemo potest: nisi forte de omnibus
5 bonis vel hereditate controversia sit. Item tria onera tutelae non affectatae vel curae praestant vacationem, quamdiu

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§ 1. Persons employed by the emperor on his own affairs could also claim exemption: 'hi vero, quibus princeps curam alicuius rei iunxit, excusantur a tutela, donec curam gerunt' Dig. 27. 1. 22. 1; ib. 41 pr., Cod. 5. 62. 10. The semestria was a collection of decisions delivered by M. Aurelius in his privy council—so called perhaps because the latter was subject to reconstitution half yearly, Dig. 2. 14. 46; 18. 7. 10; 29. 2. 12. But a gloss says 'semestria sunt codex, in quo legislationes per sex menses prolatae in unum redigebantur.'

§ 2. Persons absent rei publicae causa were exempt from newly-tendered guardianships during their absence and for a year after their return: when sent abroad on such state business they were excused from any tutela which they were invested with at the time, but on their return they had to resume it without any 'anni vacatio' Dig. 27. 1. 10. 2, Cod. 5. 64. 1.

§ 3. Potestas means any magistracy, superior or inferior, Dig. 27. 1. 6. 14–16; ib. 17. 4–5. Fragm. Vat. 146 ('qui Romae magistratu funguntur, quamdiu hoc funguntur, dari tutores non possunt') is not meant to exclude municipal magistrates.

§ 4. 'Propter litem, quam quis cum pupillo habet, excusare se a tutela non potest, nisi de omnibus bonis aut plurima parte eorum controversia sit' Dig. 27. 1. 21 pr., 'volumus . . . . si quis obligatum habuerit minorem aut eius res, hunc non omnino ad curationem eius, vel si a legibus vocetur, accedere' Nov. 72. 1.

§ 5. Yet if, even where a man already had three independent tutelae, they gave him but little trouble, or if one of them was near its termination, he would not be easily excused; while conversely a single tutela of great difficulty or responsibility would be regarded as ground for exemption,

administrantur: ut tamen plurium pupillorum tutela vel cura eorundem bonorum, veluti fratrum, pro una computetur.
Sed et propter paupertatem excusationem tribui tam divi 6
fratres quam per se divus Marcus rescripsit, si quis imparem
se oneri iniuncto possit docere. Item propter adversam vale- 7
tudinem, propter quam nec suis quidem negotiis interesse
potest, excusatio locum habet. Similiter eum qui litteras 8
nesciret excusandum esse divus Pius rescripsit: quamvis et
imperiti litterarum possunt ad administrationem negotiorum
sufficere. Item si propter inimicitiam aliquem testamento 9
tutorem pater dederit, hoc ipsum praestat ei excusationem:
sicut per contrarium non excusantur, qui se tutelam patri
pupillorum administraturos promiserunt. Non esse autem 10
admittendam excusationem eius, qui hoc solo utitur, quod
ignotus patri pupillorum sit, divi fratres rescripserunt. Inimi- 11
citiae, quas quis cum patre pupillorum vel adultorum exercuit,
si capitales fuerunt nec reconciliatio intervenit, a tutela solent
excusare. Item si quis status controversiam a pupillorum 12

Dig. 27. 1. 17 pr.; ib. 31. 24. It was not necessary that the three tutelae should be vested in the same person, provided they were 'in domo una', and the paterfamilias was pecuniarily liable on them all, Dig. ib. 2. 9. '[Affectata est] si vel appetita videatur, vel, cum posset quis se excusare, se non excusavit,' Fragm. Vat. 188.

§ 6. The excusandus must apparently be so poor as to require all his time to earn his own living, Dig. 27. 1. 7; ib. 40. 1. Persons too poor to give security if required were removed, Cod. 5. 42. 2. The divi fratres are M. Aurelius and Lucius Verus (A.D. 161–169).

§ 7. In a case of merely temporary illness a curator would be appointed ad interim, Dig. 27. 1. 10. 8. Physical defects, such as blindness, deafness, or dumbness, were also grounds of excuse (Fragm. Vat. 238), though the last two are said in Dig. 26. 1. 1. 2 and 3 to incapacitate.

§ 8. In Dig. 27. 1. 6. 19 Paulus and Modestinus cite a rescript of Hadrian and A. Pius, 'eius qui neget literas se scire excusatio accipi non debet, si modo non sit expers negotiorum.' Perhaps the best way of reconciling this with the text is to take § 8 in close connection with § 7 (similiter): 'ignorance of reading and writing is not, as a rule, a ground of excuse, any more than mere ill health: in both cases there must be absolute inability to cope with business.'

§ 9. The last sentence of this section requires some such addition as 'etiamsi alias excusationem habeant' Dig. 27. 1. 15. 1; 26. 2. 29.

§ 11. For this use of 'capitalis' cf. Cod. 2. 20. 7, 'capitales minae.'

§ 12. A suit relating to a person's status (status controversia) might be undertaken on political grounds (quaestio de civitate) by reason of the

13 patre passus est, excusatur a tutela. Item maior septuaginta annis a tutela vel cura se potest excusare. minores autem viginti et quinque annis olim quidem excusabantur: a nostra autem constitutione prohibentur ad tutelam vel curam aspirare, adeo ut nec excusatione opus fiat. qua constitutione cavetur, ut nec pupillus ad legitimam tutelam vocetur nec adultus: cum erat incivile eos, qui alieno auxilio in rebus suis administrandis egere noscuntur et sub aliis reguntur, aliorum
14 tutelam vel curam subire. Idem et in milite observandum
15 est, ut nec volens ad tutelae munus admittatur. Item Romae grammatici rhetores et medici et qui in patria sua id exercent et intra numerum sunt, a tutela vel cura habent vacationem.

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public rights which citizenship conferred: more often it arose through the connection between it and some private right, to enjoy which the civitas of some individual was asserted or denied. In this case the controversia was usually made up into an independent issue in the form of a praeiudicium, though in effect only incidental to another (and the main) question. Thus (e.g.) the validity of a will might be disputed on the ground that the testator was no civis. Sometimes the status controversia was in reality, as well as in show, an independent suit, undertaken to establish dominium over a slave, or potestas over a filiusfamilias; and here the person whose status was in question could not appear personally, but must be represented (as e.g. the slave by an adsertor libertatis). Another not uncommon subject of this kind of suit was free birth, ingenuitas.

§ 13. If, before Justinian's enactment (Cod. 5. 30. 5), a minor became tutor (e.g. legitimus or testamento) he was not disqualified, but a tutor praetorius was put in until he came of age (Dig. 27. 3. 9. 1). The result of his law (nemo in tutelam vocetur, antequam quintum et vicesimum suae aetatis annum impleat) was that, if the nearest agnate was a minor, he was completely passed over in favour of the next legitimus who was of age. Yet if a minor were appointed by will a tutor dativus was still nominated ad interim, as is clear from Tit. 4. 2 supr., and Dig. 26. 2. 32. 2.

§ 14. Soldiers on actual service, i.e. before discharge, were absolutely disabled from being tutors or curators, Cod. 5. 34. 4. If honourably discharged at the end of the full term of service (twenty years) they were permanently entitled to exemption, except from the tutela or cura of children of soldiers, as to whom their excusatio lasted one year only. In case of honourable discharge after less than five years' service no exemption was allowed: after five years they were excused for one year, after eight for two, after twelve for three, and after sixteen for four, Dig. 27. 1. 8.

§ 15. 'Grammatici sunt, qui aliquid diligenter et acute scienterque

Qui autem se vult excusare, si plures habeat excusationes 16
et de quibusdam non probaverit, aliis uti intra tempora non prohibetur. qui excusare se volunt, non appellant: sed intra dies quinquaginta continuos, ex quo cognoverunt, excusare se debent (cuiuscumque generis sunt, id est qualitercumque dati fuerint tutores), si intra centesimum lapidem sunt ab eo loco, ubi tutores dati sunt: si vero ultra centesimum habitant, dinu-

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possint aut dicere aut scribere, proprie poetarum interpretes' (Corn. Nepos apud Suet. de Ill. Gramm. 4), 'grammatica professio recte loquendi scientia et poetarum enarratio' Quintil. Inst. Or. 1. 4. 2, 'grammatica circa curam sermonis versatur, circa historias, circa carmina' Seneca, Ep. 88. 2. The 'numerus' was determined by the size of the town, and a grammaticus, physician, or rhetorician, was admitted into it by magisterial decree: 'est autem etiam numerus definitus eorum, qui in singulis civitatibus immunitatem habeant, et condiciones quaedam adiectae in lege: quod intellegitur ex epistola Antonini quae data est ad commune Asiae, sed pertinet ad orbem universum, cuius est caput infra scriptum: civitates minores possunt habere immunes medicos quinque et sophistas tres eodemque numero grammaticos: maiores civitates septem qui medeantur, quattuor sophistas, quattuor qui doceant literas utrasque: maximae vero medicos decem et rhetores quinque eodemque numero grammaticos, super hunc autem numerum ne maxima quidem civitas immunitatem confert' Dig. 27. 1. 6. 2–3.

§ 16. So, too, Ulpian says in Dig. 49. 4. 1. 1 'si quis tutor datus fuerit vel testamento vel a quo alio qui ius dandi habet, non oportet eum provocare; hoc enim divus Marcus effecit: sed intra tempora praestituta excusationem allegandam habet, et si fuerit pulsa, tunc demum appellare debebit, caeterum ante frustra appellatur'. It must not be inferred from 'datus' in this passage, or from 'id est, qualitercumque dati fuerint' in the text, that the exemptions did not extend to tutores legitimi. Theophilus explains τεσταμεντάριοι . . λεγίτιμοι . . ὑπὸ ἄρχοντος διδόμενοι. For the time within which the excuse must be proved cf. Dig. 27. 1. 38 'quinquaginta dierum spatium tantummodo ad contestandas excusationum causas pertinet: peragendo enim negotio ex die nominationis continui quattuor menses constituti sunt'.

Besides the classes of persons mentioned in this Title, the following could claim exemption: (1) Spiritual persons who were not already incapacitated (bishops and monks, Nov. 123. 5) Cod. 1. 3. 52. (2) Jurists who belonged to the emperor's consilium, Dig. 27. 1. 30. (3) Persons not domiciled in the place where their tutorial functions were to be exercised, Dig. 27. 1. 46. 2. Similarly a tutor or curator could claim to be excused from the management of property in another province, or at least 100 miles from his usual place of residence, Dig. ib. 10. 4. (4) Members of a corporation on which this privilege had been conferred by special enactment, Dig. ib. 17. 1. Finally, a tutor or curator could lay

meratione facta viginti millium diurnorum et amplius triginta dierum. quod tamen, ut Scaevola dicebat, sic debet compu-
17 tari, ne minus sint quam quinquaginta dies. Datus autem
18 tutor ad universum patrimonium datus esse creditur. Qui tutelam alicuius gessit, invitus curator eiusdem fieri non compellitur, in tantum ut, licet pater, qui testamento tutorem dederit, adiecit se eundem curatorem dare, tamen invitum eum curam suscipere non cogendum divi Severus et Antoninus
19 rescripserunt. Idem rescripserunt maritum uxori suae cura-
20 torem datum excusare se posse, licet se immisceat. Si quis autem falsis allegationibus excusationem tutelae meruit, non est liberatus onere tutelae.

XXVI

DE SUSPECTIS TUTORIBUS ET CURATORIBUS

Sciendum est suspecti crimen e lege duodecim tabularum
1 descendere. Datum est autem ius removendi suspectos tutores Romae praetori et in provinciis praesidibus earum et legato
2 proconsulis. Ostendimus, qui possunt de suspecto cognoscere: nunc videamus, qui suspecti fieri possunt. Et quidem omnes tutores possunt, sive testamentarii sint sive non, sed alterius generis tutores. quare et si legitimus sit tutor, accusari poterit. quid si patronus? adhuc idem erit dicendum: dummodo meminerimus famae patroni parcendum, licet ut
3 suspectus remotus fuerit. Consequens est, ut videamus, qui possint suspectos postulare. et sciendum est quasi publicam esse hanc actionem, hoc est omnibus patere. quin immo et

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down an office which he had already begun to administer (1) when he was made a member of the imperial council, Dig. 4. 4. 11. 2; (2) when he changed his domicile with the emperor's sanction, provided the latter knew he was a tutor or curator, Dig. 27. 1. 12. 1; (3) on occasion of illness so severe as to entirely incapacitate him for the discharge of his duties, Dig. ib. 10. 8; ib. 45. 4.

§ 19. Immixtio amounted to an implied promise to undertake the office, and those who had promised were as a rule debarred from urging any ground of excuse whatever, see on § 9 supr.

Tit. XXVI. 3. The actio suspecti tutoris was not a genuine crimen publicum (for which see Bk. iv. 18 inf.), and though it resembles the actiones populares in lying at the suit of any one (except infames) the object of these was properly rather the recovery of a penalty, see Bk. iv.

mulieres admittuntur ex rescripto divorum Severi et Antonini, sed hac solae, quae pietatis necessitudine ductae ad hoc procedunt, ut puta mater: nutrix quoque et avia possunt, potest et soror: sed et si qua mulier fuerit cuius praetor perpensam pietatem intellexerit non sexus verecundiam egredientis, sed pietate productam non continere iniuriam pupillorum, admittit eam ad accusationem. Impuberes non possunt tutores 4
suos suspectos postulare: puberes autem curatores suos ex consilio necessariorum suspectos possunt arguere: et ita divi Severus et Antoninus rescripserunt. Suspectus est autem, qui 5
non ex fide tutelam gerit, licet solvendo est, ut et Iulianus quoque scripsit. sed et ante, quam incipiat gerere tutelam tutor, posse eum quasi suspectum removeri idem Iulianus scripsit et secundum eum constitutum est. Suspectus autem 6
remotus, si quidem ob dolum, famosus est: si ob culpam, non aeque. Si quis autem suspectus postulatur, quoad cognitio 7
finiatur, interdicitur ei administratio, ut Papiniano visum est. Sed si suspecti cognitio suscepta fuerit posteaque tutor vel 8
curator decesserit, extinguitur cognitio suspecti. Si quis tutor 9
copiam sui non faciat, ut alimenta pupillo decernantur, cavetur

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5. 1; ib. 9. 1 inf. There is evidence, however, that the magistrate sometimes inflicted a fine, of which a half went to the accuser. Colleagues of the tutor gerens were legally bound to accuse him as suspectus, if they saw cause; and in default of an accuser the magistrate might take measures for his deposition virtute officii, Dig. 26. 10. 3. 4.

Some further information as to the meaning of suspectus is given in §§ 9 and 13 inf. Ulpian thought that a person proposed as tutor might be rejected on the ground of some misconduct of which he had been guilty before entering on the office, but that until he had done so he could not be proceeded against as suspectus, even though the wrong had affected the pupil's interests, Dig. 26. 10. 3. 4 and 5. Julianus (Dig. 27. 1. 20) held the opinion maintained in the text, that even before entering on his duties he could be charged as suspectus.

§ 6. 'Suspectos tutores ex dolo, non etiam eos, qui ob neglegentiam remoti sunt, infames fieri manifestum est' Cod. 5. 43. 9. It seems, however, that removal for gross negligence entailed infamia: 'si fraus non sit admissa, sed lata neglegentia, quia ista prope fraudem accedit, removeri hunc quasi suspectum oportet' Dig. 26. 10. 7. 1, 'si neglegentia et nimia cessatio obiciatur . . . removendum eum, qui dignus tali *nota* videbitur' Dig. 27. 2. 6.

§ 9. It has been already mentioned that as a general rule the tutor had nothing to do with the rearing and education of his pupil; this was

epistula divorum Severi et Antonini, ut in possessionem bonorum eius pupillus mittatur: et quae mora deteriora futura sunt, dato curatore distrahi iubentur. ergo ut suspectus
10 removeri poterit qui non praestat alimenta. Sed si quis praesens negat propter inopiam alimenta posse decerni, si hoc per mendacium dicat, remittendum eum esse ad praefectum urbis puniendum placuit, sicut ille remittitur, qui data pecunia
11 ministerium tutelae redemit. Libertus quoque, si fraudulenter gessisse tutelam filiorum vel nepotum patroni probetur, ad
12 praefectum urbis remittitur puniendus. Novissime sciendum est eos, qui fraudulenter tutelam vel curam administrant, etiamsi satis offerant, removendos a tutela, quia satisdatio propositum tutoris malevolum non mutat, sed diutius
13 grassandi in re familiari facultatem praestat. Suspectum enim eum putamus, qui moribus talis est, ut suspectus sit: enimvero tutor vel curator quamvis pauper est, fidelis tamen et diligens, removendus non est quasi suspectus.

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entrusted to the latter's nearest relations, to whom the tutor made a payment of so much per annum for this purpose, the precise sum being fixed by the magistrate in proportion to the pupil's fortune as estimated by the tutor himself. If, after the annual allowance being thus fixed, the tutor failed to provide it regularly, there was prima facie evidence of maladministration sufficient to warrant removal. The object of the pupil's being 'missus in possessionem' of the tutor's property was partly to induce the latter to appear, partly to guarantee the former against losses which might have occurred in his fortune through the tutor's fraud or carelessness, Dig. 26. 10. 7. 2.

EXCURSUS I

CAPITIS DEMINUTIO

Upon the nature of capitis deminutio minima a different view is maintained by Savigny from that adopted in the note on Bk. i. 16. 3. He argues that the essence of all capitis deminutio is a degradation, or ' downward step on the ladder of status '. As applied to the two higher modes (maxima and media) this theory is not out of accord with the facts : there can be no doubt that a free man who became a slave, or a civis who became Latinus or peregrinus, was thereby degraded to a lower civil position. As applied, however, to capitis deminutio minima it presents insuperable difficulties : it is neither established by the authorities, nor can the inferences which must logically be drawn from it be reconciled with the statements of the jurists and other writers.

(1) On Savigny's hypothesis capitis deminutio minima occurred only in two cases : (*a*) where a person sui iuris passed into potestas or manus : (*b*) where a filiusfamilias, or woman in manu, was conveyed into the condition of mancipium in order thereby to be emancipated or given in adoption. Accordingly, the children of an adrogatus will not be capite minuti when they pass along with him into the potestas and familia of the adrogator : yet the very opposite of this is stated by Paulus in Dig. 4. 5. 3 ' liberos qui adrogatum parentem sequuntur placet minui caput, cum in aliena potestate sunt, et cum familiam mutaverint '. Savigny boldly says that Paulus was wrong, that his view is unsupported by any other jurist, and is in fact peculiar to himself : but he seems to have overlooked the force of the word ' placet ', which certainly means ' is the received doctrine ' (' verbum de iure antea controverso, iurisconsultorum responsis stabilito, sollemne ' Schrader), and it can hardly be doubted that if Paulus had been stating his own individual opinion he would have said ' puto ', or ' videtur mihi '. On this point Savigny is altogether unsupported by textual authority.

(2) On Savigny's hypothesis a woman who passed in manum was capite minuta only if she were sui iuris before the conventio in manum, not if she were already in potestas. But this distinction is quite

unknown to the authorities: Gaius says (i. 115 a, 162; iv. 38) that a woman who passed in manum underwent capitis deminutio, and does not add that this occurred only when she had been sui iuris, and there is the same silence as to the assumed distinction in Ulpian, Reg. 11. 13, and Cic. Top. 4. Savigny affirms that though in these passages there is no express limitation to the case of independent women, yet this limitation must be understood, in which supposition Mr. Poste (note on Gaius i. 162) thinks there is nothing 'outrageous'.

(3) In reply to the question why a child, on being emancipated or given in adoption, was capite minutus, Savigny answers 'because a necessary step in these processes was the assumption of the condition of mancipium, a semiservile condition ("cum emancipari nemo possit nisi in imaginariam servilem causam deductus" Dig. 4. 5. 3), and it was this degradation, not the emancipation or adoption itself, which produced the capitis deminutio'. But Gaius tells us (i. 162) that a capitis deminutio ensued not only upon the child's being sold into mancipium, but upon his manumission; and even if we assumed the truth of Savigny's view for the sake of argument, it would follow that when for the old forms of emancipation and adoption Justinian substituted new forms (notes on Bk. i. Tit. 11. 2, Tit. 12. 6 supr.) in which there was no approach to 'degradation', emancipation and adoption must have ceased to be attended by capitis deminutio. But the passages in the Corpus iuris which affirm that capitis deminutio still accompanied emancipation (e.g. Bk. i. 16. 3. supr. 'vel contra:' Dig. 4. 5. 3, ib. 9, &c.), are too numerous to allow us to believe, as Savigny supposes, that they were admitted into the Corpus by an oversight of the compilers: and as adoptio plena extinguished patria potestas, we may almost certainly conclude that this extinction was still attended by change of agnatic family, which (except in one or two anomalous cases) always went hand in hand with any extinction of patria potestas which was produced by act of the parties.

There are certain legal facts upon which Savigny relies as absolutely irreconcileable with the view adopted in the notes referred to, and which are supplied by the cases of the Vestal Virgin and the Flamen Dialis. As regards the former Gellius says (1. 2) 'virgo autem Vestalis simul est capta atque in atrium Vestae deducta et pontificibus tradita, eo statim tempore sine emancipatione ac sine capitis minutione e patris potestate exit et ius testamenti faciendi adipiscitur . . . . virgo Vestalis neque heres est cuiquam intestato neque intestatae quisquam, sed bona eius in publicum redigi aiunt.

Id quo iure fiat, quaeritur.' From this passage Savigny infers that—though, as is expressly stated, she had not been capite minuta—a Vestal Virgin left her previous agnatic family. It is to be observed that this is merely an inference: all that is stated in the text is that on a vestal's dying intestate she had no heir ab intestato, but that her estate escheated to the treasury, and the lawyers were puzzled to explain this: 'id quo iure fiat quaeritur.' Savigny says the explanation is simple: 'The reason why a vestal had no intestate heirs was that a woman could have no suus heres, and that she, in particular, had no agnates to take in default, because she had left her agnatic family.' But if this had been the true solution, can we believe that the Roman lawyers were unable to discover it? It would have suggested itself to the veriest tyro; and it is inconceivable that had this been the case Gellius could have written the words 'id quo iure fiat quaeritur'. A better explanation is perhaps to be found in the vestal's immediate relation to the gods: her life had been devoted to their service, and it was only consistent that, on her dying without disposing of her property by will, it should go to the treasury for sacrificial purposes. The case of the Flamen Dialis is exactly parallel: see Gaius iii. 114.

The real fact seems to be that Savigny has been misled by his desire to establish 'a harmonious system of legal conceptions' into adopting a view against which there is an irresistible weight of textual authority; he has been overpowered by the word 'deminutio', and by the analogy which, according to him, there ought to be between deminutio maxima, media, and minima. Not to speak of the impropriety of arguing from words in the face of the clearest authority to the contrary, it may be observed that the jurists agree in describing the essence of capitis deminutio as a mere change rather than a deterioration of condition: it is a 'status mutatio'. It is true that in many cases of capitis deminutio minima (e.g. often in adoption) the agnatic rights which were lost were more than outbalanced by the rights acquired in the new family; but the prominent idea, the feature on which the legal mind is concentrated, is usually the immediate loss, not the compensatory gain. Savigny himself would not deny that there was a capitis deminutio (media) when a Roman citizen lost his civitas, even though he acquired citizenship in another city whereby he enjoyed far greater advantages: and similarly, it is always a capitis deminutio (minima) if a man loses his previous agnatic rights, even though he acquires in exchange a perhaps better and more advantageous position in another family.

Recently a work of M. Desserteaux[1] has thrown much light on the questions discussed above. According to his view, the law recognised in the earliest time no intermediate state between civitas and slavery, and mancipium, being in those days a serious and durable condition, was undistinguishable from slavery: the person who was sold into it lost not only his family, but his freedom and his citizenship as well. Hence the capitis deminutio, later termed maxima, was the only form then known. The idea of a libertas sine civitate, and the resulting recognition of a capitis deminutio media, were due to the influence of the ius gentium: that of a capitis deminutio minima to the differentiation between mancipium and true slavery, and still more to the employment of the former more and more exclusively for the attainment of purposes unimagined in its earlier history. It is noteworthy that Cicero, differing from Gaius (i. 162) and Paulus (Dig. 4. 5. 11), says that capitis deminutio (without the qualification 'minima') did not accompany all mutatio familiae, but only those forms of it which involved entry into mancipium, so that in his day the adrogatus and the woman who made a conventio in manum did not undergo it: and that this theory also explains why the Flamen Dialis and the Vestal Virgin escaped deminutio.

[1] Études sur la formation historique de la capitis deminutio: Dijon, 1909.

INTRODUCTION TO BOOK II

WITH the second Book of the Institutes we enter upon the discussion of the ius quod ad res pertinet. Instead of giving a plain statement of the contents of this branch of the legal system, Justinian follows Gaius in presenting us with a number of very perplexing cross divisions of res, which, however, only partially correspond with those of the earlier writer, and from which we are left to infer the meaning in which they both use the term when they make it their basis of classification. In three of these divisions there is no divergence between the two writers. Res are, firstly, either in patrimonio nostro or extra patrimonium nostrum (G. ii. 1, Inst. ii. 1 pr.); secondly, they are either corporales or incorporales (G. ii. 12, Inst. ii. 2 pr.): thirdly (though this classification is rather matter of inference than of direct statement), they are either res singulae or universitates (G. ii. 97, Inst. ii. 9. 6).

The main point wherein Justinian differs from Gaius is his further treatment of the res in patrimonio and extra patrimonium. This distinction Gaius hardly seems to consider of much importance, for, after stating it, he proceeds: '*Summa* itaque rerum divisio in duos articulos deducitur, nam aliae sunt divini iuris, aliae humani;' res divini iuris, as he goes on to remark, comprising res sacrae, religiosae, and sanctae; res humani iuris being either publicae or privatae. Justinian, however, makes it the basis of a further subdivision; he arranges the res which are extra patrimonium in subordinate classes—res communes, res universitatis, res publicae, and res nullius—the last corresponding with Gaius' res divini iuris. Res in patrimonio, on the other hand, either belong, or can belong, to private individuals (res singulorum); they seem to be identical with the res privatae of Gaius, and (the subject of the treatise being Private Law) are alone important for the purpose in hand. For the ascertainment of the meaning of the ius (privatum) quod ad res pertinet, the classifications of res as communes, sacrae, religiosae, publicae, and universitatis may be regarded as eliminated.

If we cast our eyes over the contents of the second and third books of Gaius and Justinian, we shall find that, so far as the

system is concerned, the only divisions of res which are of primary importance are, first, that into res corporales and incorporales, and, second, that into res singulae and universitates. Res corporales having been defined (G. ii. 13, Inst. ii. 2. 1) as tangible objects, and such tangible objects as cannot be in singulorum dominio having already been excluded, the modes in which ownership (and incidentally possession) of them can be acquired, natural (Tit. 1) and civil (Tit. 6 and 7), are explained. Res incorporales having been defined (G. ii. 14, Inst. ii. 2. 2), the nature of some of them (viz. servitudes) and their modes of acquisition are described in Titles 3–5: others, viz. obligations, occupy the greater portion of the third Book. These are all res singulae: universitates and their modes of vesting are examined under the heads of hereditas, whether testamentary (ii. 10–25) or intestate (iii. 1–9), adrogation (iii. 10), and bonorum addictio libertatis causa (iii. 11).

Speaking briefly, then, the ius quod ad res pertinet, extending over the whole of the second and third Books and part of the fourth Book of the Institutes, treats of tangible external objects of property, with their titles; real rights over them of less orbit than dominium; inheritance, comprising the subject of legacies: two less considerable forms of universal succession; and finally obligations, under the two heads of contracts and delicts or torts. All these are 'res'; the question still remains, What is the common property in virtue of which they are classed together, and the law relating to them set apart as one of the three great departments of the private code? To this question Mr. Poste (Gaius, pp. 148 sq.), following Austin, answers that the law relating to res is set apart because it is the law of equal rights. By this he appears to mean, that in it all persons are regarded as equal, in the sense that exactly the same capacity of right and of disposition is ascribed to all, and that differences in such capacity are left out of sight, as belonging properly to the law of Persons or unequal rights. If this is his meaning, we cannot but reject it as entirely misleading. The division of law into law of equal and law of unequal rights is no older than Austin, and to attribute an acquaintance with it to Gaius is a mere anachronism. If by the ius quod ad res pertinet Gaius had meant to express the law of equal rights, he would not, in it, have noticed incapacities of disposition (as he does in ii. 47, 80 sq.: cf. Inst. ii. 8. 2), incapacities of right (as he does in ii. 87 sq.: cf. Inst. ii. 9. 1 and 2), disabilities in certain classes to take benefits of a particular kind (as he does in ii. 111) or exceptions from the ordinary rules for the execution of testaments

(ii. 109; Inst. ii. 11): it would be superfluous to multiply instances from the law of contract or delict, for the objection that nearly the whole of the law relating to remedial rights, which as a matter of fact is placed under the head of actions, would on his hypothesis belong to the law of res, is fatal by itself.

A far truer explanation of this branch of the system is given by Professor Holland (Jurisprudence, p. 85), who, following Savigny (System § 53), defines it as the department of law which treats of such modifications of rights as result from varieties in the objects or in the acts with which they are concerned. '"Res" (the Roman lawyers tell us) are either "corporeal", things which can be touched, such as a farm, a slave: or "incorporeal", which cannot be touched, consisting in right only, such as a right of servitude, a right of action, a right arising out of contract. Now "corporeal" things are obviously what we have called the "objects" of the right; "incorporeal" things are the advantages which the person entitled can insist upon; in other words, "the acts or forbearances" to which he is entitled.' Though this may be true in the abstract, it seems erroneous to credit Gaius, to whom Justinian owed his classification, with a conscious juristic analysis of which there is no clear indication in his writings, and the importance of which, though familiar to us, seems to have first been placed in clear light by the continental jurists from whom it was derived by Austin.

The true point of contact between the various res seems in reality to be the fact that whoever has a res is, actually or prospectively, so much the better off. If then we embrace everything by acquiring which a man is materially better off—be it an estate or a five-pound note, a ius in re aliena or an inheritance, a right of action on a contract or a delict—under the general notion of property, we shall find in the ius quod ad res pertinet the law of proprietary relations, which is treated under the heads of Ownership, real rights less than Ownership, Possession, Inheritance, other universal successions, Contracts and Delicts. Of ownership or dominium, as a right or aggregate of rights, we are told little in the abstract; we have to gather its content from isolated passages. That it includes the rights of use and enjoyment is clear from the power of the dominus to separate them off from his dominium, and vest them in other persons as distinct and independent iura in re aliena (Tit. 4. 1): from Tit. 1. 12 we gather that the owner has the *exclusive* right to the thing, and may lawfully prohibit others from interfering with his own enjoyment of it; the right of alienation inter vivos is stated emphatically in Tit. 1. 40;

that of testamentary disposition is attested by the phrase of the Twelve Tables—uti legassit super pecunia tutelave suae rei, ita ius esto—and is expounded at length in Titles 10–25. Certain abnormal cases, in which a person, though not owner, may, or, though owner, may not alienate, are noticed in Tit. 8. But the bulk of the text relating to dominium is taken up by the modes, natural and civil, original and derivative, in which it may be acquired, the preponderance of natural over civil titles, as compared with the law of Gaius' age, being particularly noteworthy. Titles 3–5 relate to the fragments of ownership called servitudes, which correspond very roughly to the easements and profits of English Law. Title 9 discusses the question of agency in the acquisition of ownership, and states the changes which had taken place since Gaius in the proprietary capacity of filiifamilias; here too we get a reference to Possession, which is not treated in extenso, but a knowledge of its rules is presupposed in the Title on Usucapio, and is supplied in an Excursus below.

The transition from modes 'quibus res singulae adquiruntur' to those 'quibus adquiruntur per universitatem', brings us to the law of Inheritance; the rules which prescribe the devolution of a man's universitas iuris on his decease. This may take place either ex testamento or ab intestato: the exposition of testamentary succession occupies the remainder of the Book. Firstly (Title 10), are described the solemnities necessary for the execution of a valid will, the qualification required in the witnesses taking up some considerable space; but from these formalities soldiers, while on actual service, are exempt, and Title 11 points out the chief anomalies involved in this exemption. In Title 12 are stated the qualifications required in the testator, such as puberty and 'testamentifactio', and the special precautions to be observed in the execution of a blind man's will are alluded to. Four successive Titles then explain the most ordinary contents of a testament, viz. exheredation of issue whom the testator wishes to exclude from all share in his succession (Title 13); the institution of the heres or universal successor (Title 14); substitutions 'vulgar' (Title 15) and 'pupillary' (Title 16), answering in some degree to the remainders so familiar in English deeds and wills. Title 17 enumerates the modes in which a testament might be or become void, such as original informality, revocation, subsequent birth of a suus heres, and capitis deminutio of the testator: and in Title 18 is discussed the querella inofficiosi testamenti, the right of certain relatives of the deceased to impeach and upset his will, for

not having left them a certain minimum of his property. The division of heredes into necessarii, sui et necessarii, and extranei, the necessary qualifications of the last, and the modes in which they can accept the inheritance, follow in Title 19, which also contains a reference to the vast revolution effected in the character of heres by Justinian's own introduction of the ' inventory '. Legacies are treated at length in Titles 20 and 21, and the successive limitations placed upon their amount in Title 22. The last three Titles are occupied with the subject of fideicommissa, trust successions and bequests, the legislation relating to them, and codicilli, a form of disposition resembling a will, but incapable of directly passing the deceased's universitas iuris, and employed for the purpose of creating fideicommissa, or of adding to or modifying a previously executed testament.

No small amount of criticism has been passed upon the grouping together in one department of a legal system of the topics which are comprised under the ius quod ad res pertinet, and which, we may truly say, would not be co-ordinated upon any other principle of classification. The most solid objection is the inclusion of the law of Inheritance and that of obligations in the same division with that of property and other real rights. The place of the first is due to its character as one of the modes of universal succession, among which it ranks with adrogation, bonorum addictio libertatis causa, and (in Gaius) conventio in manum, hereditatis in iure cessio, and venditio bonorum. Through this false idea of proportion the importance of Testamentary and Intestate succession, as an independent branch of law, is altogether obscured : moreover, as Savigny has remarked, these modes ' quibus res per universitatem adquiruntur ' are exclusively regarded as titles to rights, whereas they are equally sources of obligations. Accordingly, the German jurists, in their systematic treatises on Roman law, here abandon the Roman classification, and make Inheritance one of their main divisions, instead of subordinating it to that between titles to res singulae, and titles to universitates.

Why obligations are ' res ' has been already pointed out. When an obligatio is said to be a res, the active, or creditor's side of the relation is intended. The promisee in a contract, unless the promise is performed, and the plaintiff in an action on delict, have the power of recovering damages by action ; this partial control over another's freedom of action is money's worth, and falls under the category of property, in the wide sense in which the term has been used above. An even more intimate point of contact between the law of owner-

ship and the law of obligations may be found in the ultimate purpose of the largest and most important class of the latter, viz. the creation of real rights, or the communication of their exercise and enjoyment.[1] This co-ordination however of obligations with rights in rem is regarded by the Austinian school as an egregious error of arrangement, on the ground that the distinction between rights, according as they are real or personal, is a radical one for purposes of classification: yet it is adopted by the continental writers on Roman law, who subdivide Vermögensrecht, or Property law, into Sachenrecht, comprising ownership, possession, and iura in re aliena, and the law of obligations, whether arising ex contractu or ex delicto. Indeed, the very treatment of contracts and delicts together, as facts or events from which obligations arise, is considered faulty by Dr. Hunter, because, as he alleges, the sole connection between them was that they formed two subdivisions of actiones in personam. ‘ In the statement of claim it was alleged that the defendant ought to do or pay something. In an action, then, upon a contract or delict, the formulae were very similar, while both stood in marked contrast to the formula in an actio in rem. It was easy to understand, therefore, why the Roman writers included contract and delict under the common designation of obligatio ’ (Roman Law, Introduction, p. xxxvi). It is not however the action, but the right which the action is designed to enforce, to which attention should be directed; and whether a man refuses to perform his contract, or violates a right in rem, the right which arises from the refusal or the violation is a right in personam. It may be replied that this involves a confusion between antecedent and remedial rights: but this is a purely party objection which Gaius could not have been expected to answer. On the other hand, Dr. Hunter may himself be met by the charge that he regards contracts from the wrong point of view. A contract may be analysed into two elements, the agreement or promise, and the obligation which is annexed to it by law. Now Roman and modern law differ as regards the importance which they respectively attribute to these two elements: the former bringing the obligation into the foreground, the latter rather dwelling on the consensus of the parties. Yet the Roman view here seems to be strictly correct and lawyer-like, for a promise without an obligation, such as English lawyers call a nudum pactum, is in the eye of the law non-existent, while an obligation has an independent legal existence: it is the obligation, consequently, which for legal purposes should be deemed of primary importance,

[1] Cf. Savigny, System i. p. 372.

and constituted a summum genus for purposes of classification. If contracts are not to stand isolated and out of all connection with other parts of the system, they must, in reason, be co-ordinated with other facts from which the same kind of legal relation, namely obligation, arises. And from this point of view Dr. Hunter is himself inconsistent, for he co-ordinates with contracts certain other sources of obligation, viz. quasi-contract, and what he calls Status, while he omits delict from this connection altogether. Under Status, as a source of obligation, he groups the family relations of husband and wife, and parent and child ; but the incorrectness of this had been long before shown by Savigny (System § 58), who remarks that these relations, and that produced by contract or delict, are altogether disparate ; the latter being the partial and temporary subjection of one person to the will of another, the former being permanent, and having a content natural and moral as well as legal : its legal content being not so much the personal right against the other party as a real right to non-disturbance by the world at large.[1]

Important changes had taken place in the law comprised in this second Book since the time of Gaius. In respect of modes of acquisition the ius gentium had reaped another triumph ; in iure cessio and mancipatio, the oldest titles of the ius civile, had already become practically obsolete, and the latter was formally abolished by Justinian, who also swept away, in its train, a troublesome distinction and much antiquated learning. The simplification of law effected by the recognition of traditio or mere delivery as the universal mode of conveying res singulae is however perhaps no more to be admired than Justinian's masterly codification, or more properly reform, of the law of Usucapio or Prescription, which had hitherto consisted of two different sets of rules, the one civil, the other praetorian, whose divergence had been occasioned by the absurd survival of the doctrine that provincial soil could not be owned by private individuals. The great change in the proprietary rights of filiifamilias, initiated under Constantine by the institution of quasi-castrense and adventitium peculium, was consummated by Justinian himself ; the survival of the patria potestas was thus made tolerable by the partial surrender of one of its most valuable privileges. The direct acquisition of possession, and so of ownership, through agents, had been sanctioned by a constitution of Severus, based upon a consensus among the jurists, who in Gaius' time had been divided upon the question ; and the interests of mortgagors were carefully guarded by Justinian's

[1] Cf. Holland's Jurisprudence, pp. 112 and 165.

regulations as to the exercise of powers of sale and foreclosure. In the law of wills, apart from changes in their form, and the introduction already noticed, of the ' inventory ', by far the most important development was that effected by Justinian's assimilation of legacies and fideicommissa. When Gaius wrote, prescribed forms were still required for the former, which were also recovered by different remedies ; but, by requiring the observance of certain evidentiary solemnities in the creation of fideicommissa, by freeing legacies from the trammels of language, and by the abolition of the formulary procedure, later emperors had removed many of the distinctions between them, and such as had remained were swept away by Justinian's ordinance, that in future the rules and remedies of each should apply to both indifferently, which also presented an opportunity for constructing one consistent enactment from the provisions of the senatus consulta Trebellianum and Pegasianum, the latter of which had half undone the judicious rule introduced by the former for the assimilation of fideicommissarii to directi heredes. Many unreasonable prohibitions, such as those of legacies to incertae personae, poenae nomine, and post mortem heredis, were also abolished by Justinian, whose changes in connection with the querella inofficiosi testamenti, both before and after the publication of the Institutes, are noticed in the notes to Title 18.

LIBER SECUNDUS

I

DE RERUM DIVISIONE

Superiore libro **de iure personarum exposuimus: modo** G. ii. 1.
videamus de rebus. quae vel in nostro patrimonio vel extra nostrum patrimonium habentur. quaedam enim naturali iure communia sunt omnium, quaedam publica, quaedam universitatis, quaedam nullius, pleraque singulorum, quae variis ex causis cuique adquiruntur, sicut ex subiectis apparebit.

Et quidem naturali iure communia sunt omnium haec: aer 1
et aqua profluens et mare et per hoc litora maris. nemo igitur ad litus maris accedere prohibetur, dum tamen villis et monumentis et aedificiis abstineat, quia non sunt iuris gentium, sicut et mare. Flumina autem omnia et portus publica sunt: 2
ideoque ius piscandi omnibus commune est in portubus

Tit. I. By res extra patrimonium seems to be meant a thing which is legally incapable of being owned by a private person, i.e. it does not cease to be in patrimonio by not having, or by ceasing to have, a private owner. Extra patrimonium is thus equivalent to extra commercium: but in the former the res is viewed as incapable of private dominium, in the latter rather as incapable of acquisition by a private person. Having drawn the distinction, Justinian proceeds to classify res extra patrimonium under four heads.

§ **1.** Cf. Plautus, Rud. 4. 3. 36 'mare quidem commune certo'st omnibus', Cicero, pro Rosc. 26 'quid tam est commune, quam spiritus vivis, mare fluctuantibus, litus eiectis?' Seneca, Benef. 4. 28, Ovid, Metam. 6. 349. The seashore up to the line of the highest tide in flood or storm (hibernus = per hiemem, vel ventis excitatus), § 3, was communis because incapable of appropriation, though if by driving piles one erected a building upon any part of it he acquired property in the structure (but not in the soil, § 5 inf.) so long as it stood. This, however, could not be done without a decretum of the praetor, Dig. 41. 1. 50. The modern doctrine that the seashore between high and low tide belongs to the state is derived from Celsus, Dig. 43. 8. 3, who, with Neratius (Dig. 41. 1. 14) treats the seashore as res publica rather than communis.

§ **2.** Res publicae seem to be divisible into two classes, (1) Things which belong to and are used by the state as by a private person: e. g. public slaves, money, stores, &c.: these are not properly extra patrimonium nostrum. (2) Things which are publico usui destinatae (i. e.

3 fluminibusque. Est autem litus maris, quatenus hibernus
4 fluctus maximus excurrit. Riparum quoque usus publicus est iuris gentium, sicut ipsius fluminis: itaque navem ad eas appellere, funes ex arboribus ibi natis religare, onus aliquid in his reponere cuilibet liberum est, sicuti per ipsum flumen navigare. sed proprietas earum illorum est, quorum praediis haerent: qua de causa arbores quoque in isdem natae eorun-
5 dem sunt. Litorum quoque usus publicus iuris gentium est, sicut ipsius maris: et ob id quibuslibet liberum est casam ibi imponere, in qua se recipiant, sicut retia siccare et ex mare deducere. proprietas autem eorum potest intellegi nullius esse, sed eiusdem iuris esse, cuius et mare et quae subiacent mari,
6 terra vel harena. Universitatis sunt, non singulorum veluti quae in civitatibus sunt, ut theatra stadia et similia et si qua alia sunt communia civitatium.

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not communes generally, but only to cives), e. g. roads, harbours, public rivers (i. e. flumina perennia, Dig. 43. 12. 3) and their beds. The banks of public rivers were private property, subjected by the law to a kind of servitude in favour of all members of the state, § 4 inf.

§ 6. Universitas here seems to be used as equivalent to civitas, i. e. a Roman city or municipium. Taken in this sense, res universitatis are analogous to res publicae, and are divisible in the same manner. Such property only of a provincial city as is municipum usui destinatum is extra patrimonium: a res publica is a thing which any civis may use: a res universitatis is one which may be used as of right only by the members of the universitas.

Taken in its widest sense, universitas is fairly equivalent to the 'juristic person' of modern writers. For the definition and characteristics of juristic persons in general reference may be made to Holland's Jurisprudence, pp. 225 sq.: those recognised by Roman law may be subdivided into universitates personarum and universitates bonorum. [The latter should not be confounded with so-called universitates rerum (distantium), such as a flock of sheep, which have no independent legal existence apart from the elements which go to make them up: here both whole and parts are actual and corporeal; see Dig. 7. 1. 70. 3: 41. 1. 7. 11: 41. 3. 23 pr.]

A universitas personarum (or corporation) is an aggregate of natural persons forming an ideal whole, regarded by the law as a 'person' distinct from its members for the time being, because its existence does not cease along with theirs, and invested with rights and subject to duties, other than those of the individuals, taken singly, of which it is composed: so that legal relations can subsist between it and them and any number of them no less than between it and other persons generally. Such

Nullius autem sunt **res sacrae et religiosae** et sanctae: **quod** 7 G. ii. 3, 9.
enim **divini iuris** est, **id nullius in bonis est. Sacra** sunt, **quae** 8
rite et per pontifices deo **consecrata sunt**, veluti aedes sacrae et dona, quae rite ad ministerium dei dedicata sunt, quae etiam per nostram constitutionem alienari et obligari prohibuimus, excepta causa redemptionis captivorum. si quis vero auctoritate sua quasi sacrum sibi constituerit, sacrum non est, sed profanum. locus autem, in quo sacrae aedes aedificatae sunt, etiam diruto aedificio adhuc sacer manet, ut et Papinianus scripsit. **Religiosum** locum unusquisque 9 G. ii. 6.

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corporations may be exemplified by the state (Dig. 49. 14, Cod. 10. 1), ecclesiastical bodies and commercial associations, collegia pistorum, fabrorum, &c. (Dig. 3. 4. 1 pr.).

Universitates bonorum are juristic persons not necessarily supported by any natural person: they are so much property, or masses of rights and duties (Güterinbegriff) personified and regarded as capable of perpetuating their separate existence and fictitious unity indefinitely, e. g. the treasury or fiscus: foundations such as churches, hospitals, and almshouses: hereditates iacentes, i. e. inheritances on which no heir has yet entered, and the 'estate' or universitas iuris of a citizen lying in captivity with the enemy, Dig. 3. 5. 19. 5. The general rule was that no corporation could be formed without legal authority, but this need not always be special, for it is clear that there were some associations which could acquire a corporate existence by conforming to certain general regulations: see e. g. the leges of the collegium funerarium of Lanuvium, C. I. L. xiv. 2112; Bruns, fontes, pp. 345–348; Girard, Textes, p. 776.

§ 7. When it is said that res sacrae, religiosae, and sanctae are res nullius, what is meant is rather that they were nullius in bonis, i. e. extra patrimonium. Res nullius, in the more technical sense, are those things which 'fiunt singulorum' by occupatio, §§ 12–18 inf.

§ 8. Res sacrae could become so only by being dedicated under public authority by a priestly ceremony (for which in the pagan time see Cic. pro Domo 47, Ovid, Fast. 1. 610, Valer. Max. 5. 10), in the later period the imperial sanction seems to have been sufficient, Dig. 5. 3. 50. 1; 11. 7. 8 pr. By consecration they ceased to be in commercio and became inalienable, though in Justinian's time moveable res sacrae might be sold for the purpose mentioned in the text (cf. Gregor. Ep. 6. 13, Socrates, Trist. Eccl. 7. 21) and also for the support of the poor in time of famine, and for payment of the debts of the church, Cod. 1. 2. 21, Nov. 120. 10. If sacred ground was captured by the enemy, it became profanum, though by a kind of postliminium it could recover its former character, Dig. 11. 7. 36.

§ 9. Gaius (ii. 4) describes res religiosae as things 'quae dis manibus relictae sunt': here little seems to be expressed by the term except ground used for burial, though there is reference to moveable res religiosae

sua voluntate facit, dum mortuum **infert in locum suum.** in communem autem locum purum invito socio inferre non licet: in commune vero sepulcrum etiam invitis ceteris licet inferre. item si alienus usus fructus est, proprietarium placet nisi consentiente usufructuario locum religiosum non facere. in alienum locum concedente domino licet inferre: et licet postea ratum habuerit, quam illatus est mortuus, tamen
G.ii.8. 10 religiosus locus fit. **Sanctae quoque res, veluti muri et portae, quodammodo divini iuris sunt** et ideo **nullius in bonis sunt.** ideo autem muros sanctos dicimus, quia poena capitis constituta sit in eos, qui aliquid in muros deliquerint. ideo et legum eas partes, quibus poenas constituimus adversus eos qui contra leges fecerint, sanctiones vocamus.

11 Singulorum autem hominum multis modis res fiunt: quarundam enim rerum dominium nanciscimur iure naturali, quod, sicut diximus, appellatur ius gentium, quarundam iure civili. commodius est itaque a vetustiore iure incipere. palam est

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in Bk. iv. 18. 9 inf., and Dig. 48. 13. 1. As is said in the text, soil could be made religiosus by its full owner burying a corpse in it, or (Dig. 11. 7. 4) being buried in it himself: hence, as Gaius points out (ii. 7), provincial soil could not properly become religiosus because it could not be owned ex iure Quiritium by a private person: however, 'pro religioso habebatur.' Ground which had thus become divini iuris was to a certain extent private property, as in the case of family burial-places: it was extra patrimonium only in the sense that it could not be diverted from the purpose to which it had been devoted.

§ 10. Under the older law res were made sanctae by a religious ceremony: 'sanctum . . . a sanguine hostiae . . . nihil enim sanctum apud veteres dicebatur, nisi quod hostiae sanguine esset consecratum aut conspersum' Isidor. Orig. 15. 4, the result being 'ut violari sine poena (maiore) non possent' Aelius Gall. apud Festum, 'sancire est confirmare et irrogatione poenae ab iniuriis defendere' Isidor. l. c. It is probably the retention of the penalty without the ceremony of consecration which makes Gaius (ii. 8) speak of them as 'quodammodo divini iuris'.

§ 11. Having excluded the consideration of res which cannot be the private property of individuals, Justinian proceeds to point out the various modes in which ownership over res singulae (corporales) can be acquired. Before passing on to these, it is necessary to note briefly the various meanings which the term dominium (ownership) bore in the course of legal history and its relation to other cognate notions.

Full Roman ownership, dominium ex iure Quiritium, had two conditions. It could be exercised only over such objects as were in commercio (and therefore not over res divini iuris and res publicae, especially

autem vetustius esse naturale ius, quod cum ipso genere humano rerum natura prodidit: civilia enim iura tunc coeperunt, cum et civitates condi et magistratus creari et leges scribi coeperunt.

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provincial soil): and it could be vested only in persons who had the commercium (p. 26 supr.), i. e. cives, Latini, and peregrini to whom it might have been granted as a special favour. With the rapid provincial extension of Rome and the large influx of peregrini, the strict 'civil' Roman dominium soon reproduced itself in a 'natural' counterpart. He who had the commercium, though he could not 'own' provincial soil, could stand to it in a very similar relation, called possessio properly, and later even, though laxly, dominium. Similarly the peregrinus, though he could not be dominus ex iure Quiritium, had a sort of property: the praetor granted him actions for its recovery differing only in small technical points from those which lay at the suit of the full citizen. In short, we arrive at the idea of a new kind of dominium (Gaius ii. 40) called by the moderns dominium ex iure gentium, or gentile ownership, because recognised by the ius gentium, though not by the ius civile: acquirable only in modes not peculiar to the latter, and differing from full Roman ownership also in respect of the persons in whom it could be vested, in the objects over which it could be exercised, and in the remedies by which it was vindicated.

This distinction is one between civil and natural law. But we also find another, implicated with the former only, and originating in defective conveyances. In certain things (res mancipi) property could be transferred ex iure Quiritium only by a precise observance of the mancipation form, or by in iure cessio. In course of time, however, the practice of traditio extended itself largely also to res mancipi, but the effect of this was to leave the dominium in the transferor; all that the transferee acquired was bona fide possession, he was said to have the thing 'in bonis'; by later writers he is called 'bonitarian' owner. In a short time (Tit. 6 inf.) his possession ripens by prescription into full ownership: meanwhile his transferor's rights over the object (termed nudum ius Quiritium) are merely nominal, and against him sometimes (note (3) on Bk. iv. 6. 4 inf.) no less than against the rest of the world, the transferee, as bona fide possessor, has the actio Publiciana for the recovery of the property if taken out of his hands. Other cases of 'bonitarian' ownership, though less common than this, sprang up from the praetorian legal innovations, e. g. those of praetorian universal succession in bankruptcy and upon death: in these the proper remedy was some other fictitious action (Gaius iv. 35): 'rem in bonis nostris habere intellegimur, quotiens possidentes exceptionem, aut amittentes ad reciperandam eam actionem habemus,' Dig. 41. 1. 52.

In the time of Gaius this distinction between dominium ex iure Quiritium and in bonis habere is of every-day occurrence, but, except in respect of manumission (note on Bk. i. 5. 1 supr.) and the power of bequeathing

Cf.G.ii.66. **12** Ferae igitur bestiae et volucres et pisces, id est omnia animalia, quae in **terra mari caelo** nascuntur, simulatque ab aliquo capta fuerint, iure gentium statim illius esse incipiunt: quod enim ante nullius est, id naturali ratione occupanti conceditur. nec interest, feras bestias et volucres utrum in suo fundo quisque capiat, an in alieno: plane qui in alienum fundum ingreditur venandi aut aucupandi gratia, potest a domino, si is providerit, prohiberi ne ingrediatur. quidquid autem
G ii 67. eorum ceperis, **eo usque tuum esse intellegitur, donec tua custodia coercetur: cum vero evaserit custodiam tuam et in naturalem libertatem se receperit, tuum esse desinit et rursus occupantis fit. naturalem autem libertatem recipere intelle-**

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the thing per vindicationem (Ulp. reg. 24. 7), the differences between them are not of any practical importance. When Justinian had abolished the old points of difference between solum Italicum and solum provinciale (Tit. 6 pr. inf., Cod. 7. 31; 5. 13. 15), and peregrini had practically become unknown, all these refinements disappeared: there was but one dominium left; the only contrast was between it and possessio.

Some of the modes in which ownership is acquired in res singulae are common to most systems of law: others are peculiar to this people or that. The former the Romans supposed to have been prescribed or sanctioned by the law of nature, and therefore to be prior in time (vetustius ius) to those which are peculiar: for a peculiar mode of acquisition exists only in virtue of municipal law or custom, which is itself the outcome of political society, and political association was preceded in their view (derived from the Stoics, p. 37 supr.) by ages in which nature's was the only law, and civitates, magistratus, and leges had not yet come into existence. It is hardly necessary to observe that this view is quite erroneous: the history of Roman law alone might convince us that among primitive peoples absolute private ownership is a thing at first unknown, and that when it has been developed, alienation is the exception, not the rule, and the modes in which it is effected formal and essentially 'iuris civilis'.

§ **12**. The first 'natural' mode of acquisition discussed by Justinian is occupatio, the advisedly taking possession of an object which has no owner (res nullius) with the intention of appropriating it. The following kinds of res nullius are mentioned in the text: wild animals, birds, and fishes, §§ 12–16: enemies' property, § 17: stones and pebbles found on the seashore, § 18: islands rising in the sea, § 22: treasure-trove, § 39 (though that occupatio was the title to this is disputed by Girard, 4th ed., p. 316): and res derelictae, § 47. The Romans had no game laws, which in England grew out of feudalism and the great forests of the Norman kings and nobility. Some writers have maintained the contrary, but Dig. 47. 10. 13. 7 is explicit to the effect that the landowner can prevent others

gitur, cum vel oculos tuos effugerit vel ita sit in conspectu tuo, ut difficilis sit eius persecutio. Illud quaesitum est, an, si fera 13 bestia ita vulnerata sit, ut capi possit, statim tua esse intellegatur. quibusdam placuit statim tuam esse et eo usque tuam videri, donec eam persequaris, quodsi desieris persequi, desinere tuam esse et rursus fieri occupantis. alii non aliter putaverunt tuam esse, quam si ceperis. sed posteriorem sententiam nos confirmamus, quia multa accidere solent, ut eam non capias. Apium quoque natura fera est. itaque quae in 14 arbore tua consederint, antequam a te alveo includantur, non magis tuae esse intelleguntur, quam volucres, quae in tua arbore nidum fecerint: ideoque si alius eas incluserit, is earum dominus erit. favos quoque si quos hae fecerint, quilibet eximere potest. plane integra re si provideris ingredientem in fundum tuum, potes eum iure prohibere ne ingrediatur. examen, quod ex alveo tuo evolaverit, eo usque tuum esse intellegitur, donec in conspectu tuo est nec difficilis eius persecutio est: alioquin occupantis fit. Pavonum et columbarum fera 15 natura est. nec ad rem pertinet, quod ex consuetudine avolare et revolare solent: nam et apes idem faciunt, quarum constat feram esse naturam: cervos quoque ita quidam mansuetos habent, ut in silvas ire et redire soleant, quorum et ipsorum feram esse naturam nemo negat. **in his autem animalibus,** G. ii. 68. **quae ex consuetudine abire et redire solent, talis regula** comprobata est, ut eo usque tua esse intellegantur, donec animum revertendi habeant: nam si **revertendi animum habere desierint, etiam tua esse desinunt et fiunt occupantium. revertendi autem animum videntur desinere habere, cum revertendi consuetudinem deseruerint.** Gallinarum et anserum 16 non est fera natura idque ex eo possumus intellegere, quod

(even by force, Cic. pro Caec. 8, Dig. 43. 16. 3. 9) from coming on his land, but not from exercising occupatio when there. It would seem from the text that express notice not to enter was necessary to constitute a trespass in every case.

§ 13. The view here confirmed by Justinian was that most generally held, Dig. 41. 1. 5. 1: the other was that of Trebatius, whose opinion is highly spoken of in general in Tit. 25 pr. inf.

§ 15. Animals wild by nature, but which had been partially tamed, were thus treated differently from those which were genuinely wild: the latter became res nullius again directly they were out of one's control, the former only when they had ceased to have the animus revertendi.

aliae sunt gallinae, quas feras vocamus, item alii anseres, quos feros appellamus. ideoque si anseres tui aut gallinae tuae aliquo casu turbati turbataeve evolaverint, licet conspectum tuum effugerint, quocumque tamen loco sint, tui tuaeve esse intelleguntur: et qui lucrandi animo ea animalia retinet,
G.ii.69. 17 furtum committere intellegitur. **Item ea, quae ex hostibus capimus, iure gentium statim nostra fiunt**; adeo quidem, ut et liberi homines in servitutem nostram deducantur, qui tamen, si evaserint nostram potestatem et ad suos reversi
18 fuerint, pristinum statum recipiunt. Item lapilli gemmae et cetera, quae in litore inveniuntur, iure naturali statim inven-
19 toris fiunt. Item ea, quae ex animalibus dominio tuo subiectis nata sunt, eodem iure tibi adquiruntur.

G.ii.70. 20 Praeterea **quod per alluvionem agro tuo flumen adiecit, iure gentium tibi adquiritur. est autem alluvio incrementum latens. per alluvionem autem id videtur adici, quod ita paulatim adicitur, ut intellegere non possis, quantum quoquo mo-**
21 **mento temporis adiciatur. Quodsi vis fluminis partem aliquam**

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§ **17**. The rule of the ius gentium is stated by Cyrus in Xenoph. Cyrop. 7. 5. 73 *νόμος ἐν πᾶσιν ἀνθρώποις ἀΐδιός ἐστιν, ὅταν πολεμούντων πόλις ἁλῷ, τῶν ἑλόντων εἶναι τὰ χρήματα.* The Romans did not adhere consistently to the principle: property taken from the enemy on his own soil belonged to the state, and became 'singulorum' only by sale or grant, Dionys. Halic. Antiq. 7. 63: the rule of occupatio by individuals applied only to hostile property within the territory of the other belligerent, 'quae res hostiles apud nos sunt non publicae sed occupantium fiunt' Dig. 41. 1. 51. For restoration by postliminium see on Bk. i. 12. 5 supr., and for the influence of this principle in modern International Law, Maine, Ancient Law, p. 246 sq.

§ **19**. By eodem iure may be meant either 'iure naturali' or 'dominio'. Justinian passes from occupatio to a second title of natural law, viz. accessio, by which is meant the accrual (1) of res nullius or (2) of res alienae to our own property. Each of these heads comprises a number of distinct cases, most of which are known by specific names. Under accessio rerum nullius may be grouped (*a*) accession through natural increment, mentioned in this section; (*b*) alluvio, § 20; (*c*) formation of an island in a river, § 22; (*d*) dereliction of a river-bed, § 23: under accessio rerum alienarum (*e*) adjunctio, which comprises inaedificatio, §§ 29, 30, plantatio and satio, §§ 31, 32, and accession of writing to parchment, § 33 (cf. § 26), and of canvas or board to the picture painted thereon, § 34; (*f*) confusio and commixtio, §§ 27 and 28.

§ **21**. According to the text, property was acquired only in the trees and shrubs: but Gaius says in the Digest 'videtur acquisita', the piece

ex tuo praedio detraxerit et vicini praedio appulerit, palam est eam tuam permanere. plane si longiore tempore fundo vicini haeserit arboresque, quas secum traxerit, in eum fundum radices egerint, ex eo tempore videntur vicini fundo adquisitae esse. G. ii. 71.

22 Cf. G. ii. 72. **Insula,** quae in mari nata est, quod raro accidit, occupantis fit: nullius enim esse creditur. at **in flumine nata,** quod frequenter accidit, si quidem mediam partem fluminis teneat, **communis est eorum, qui ab utraque parte fluminis prope ripam praedia possident,** pro modo latitudinis cuiusque fundi, quae latitudo prope ripam sit. quodsi alteri parti proximior sit, eorum est tantum, **quia ab ea parte prope ripam praedia possident.** quodsi aliqua parte divisum flumen, deinde infra unitum agrum alicuius in formam insulae redegerit, eiusdem permanet is ager, cuius et fuerat.

23 Quodsi naturali alveo in universum derelicto alia parte fluere coeperit, prior quidem alveus eorum est, qui prope ripam eius praedia possident, pro modo scilicet latitudinis cuiusque agri, quae latitudo prope ripam sit, novus autem alveus eius iuris esse incipit, cuius et ipsum flumen id est publicus. quodsi post aliquod tempus ad priorem alveum reversum fuerit flumen, rursus novus alveus eorum esse incipit, qui prope ripam eius praedia possident.

24 Alia sane causa est, si cuius totus ager inundatus fuerit. neque enim inundatio speciem fundi commutat et ob id, si recesserit aqua, palam est eum fundum eius manere, cuius et fuit.

25 Cf. G. ii. 79. Cum ex aliena materia species aliqua facta sit ab aliquo,

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of land is acquired itself, and probably he is right, on the general principle that a man can no longer have property in a thing whose individuality has been lost.

§ 22. An island formed in a river is acquired by accessio only when the flumen is publicum (note on § 2 supr.): if the stream is not publicum its bed already belongs to the riparian owners. The rule for determining the ownership of insula nata is incorrectly stated in the text: it belonged exclusively to the riparian owner or owners on one side only when a line drawn down the centre of the river-bed would pass wholly to the right or left of it. If such a line cut it at all, the ownership was divided ('non pro indiviso, sed regionibus quoque divisis' Dig. 41. 1. 29) even though it was far from the exact middle.

§ 25. It is usual to enumerate, as a third natural mode of acquisition, specificatio, the converting of another's material into a new form or

quaeri solet, quis eorum naturali ratione dominus sit, utrum is qui fecerit, an ille potius qui materiae dominus fuerit: ut ecce si quis ex alienis uvis aut olivis aut spicis vinum aut oleum aut frumentum fecerit, aut ex alieno auro vel argento vel aere vas aliquod fecerit, vel ex alieno vino et melle mulsum miscuerit, vel ex alienis medicamentis emplastrum aut collyrium composuerit, vel ex aliena lana vestimentum fecerit, vel ex alienis tabulis navem vel armarium vel subsellium fabricaverit. et post multas Sabinianorum et Proculianorum ambiguitates placuit media sententia existimantium, si ea species ad materiam reduci possit, eum videri dominum esse, qui materiae dominus fuerat, si non possit reduci, eum potius intellegi dominum qui fecerit: ut ecce vas conflatum potest ad rudem massam aeris vel argenti vel auri reduci, vinum autem aut oleum aut frumentum ad uvas et olivas et spicas reverti non potest ac ne mulsum quidem ad vinum et mel resolvi potest. quodsi partim ex sua materia, partim ex aliena speciem aliquam fecerit quisque, veluti ex suo vino et alieno melle mulsum aut ex suis et alienis medicamentis emplastrum aut collyrium aut ex sua et aliena lana vestimentum fecerit, dubitandum non est hoc casu eum esse dominum qui fecerit: cum non solum operam suam dedit, sed et partem eiusdem
26 materiae praestavit. Si tamen alienam purpuram quis intexuit

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'species', as in the illustrations given in the text. The Proculians argued the case on the analogy of occupatio, and regarded the giver of the form as the owner of the product; a view which seems to have commended itself to Ulpian ('mutata forma prope interimit substantiam rei' Dig. 10. 4. 9. 3). The Sabinians viewed it as a kind of accessio, and denied any transfer of ownership, Gaius ii. 79. The intermediate opinion, confirmed by Justinian, is found in Gaius (Dig. 41. 1. 7. 7), Paulus (ib. 24), and other jurists. In Justinian, consequently, specification as a mode of acquisition occurs only when 'ea species ad materiam reduci non possit', and is really a form of occupatio, as appears from the words of Ulpian cited above, and the expression in the Digest 'quod factum est antea nullius fuerat'. Of course the giver of the form had in all cases to pay the owner of the material its full value, on the principle 'neminem cum alterius detrimento fieri locupletiorem'. It has been much disputed whether bona fides is essential to acquisition by specificatio: the passages bearing upon this point are Dig. 13. 1. 13; ib. 14. 3; 10. 4. 12. 3; 41. 3. 4. 20; 47. 2. 52. 14, and seem to establish the affirmative.

§ **26**. The principles which govern this case of the purple are as follow:

suo vestimento, licet pretiosior est purpura, accessionis vice cedit vestimento: et qui dominus fuit purpurae, **adversus eum qui subripuit habet furti actionem et condictionem**, sive ipse est qui vestimentum fecit, sive alius. nam **extinctae res licet vindicari non possint, condici tamen a furibus et** a **quibusdam aliis possessoribus possunt.** Si duorum materiae ex volun- 27 tate dominorum confusae sint, totum id corpus, quod ex confusione fit, utriusque commune est, veluti si qui vina sua confuderint aut massas argenti vel auri conflaverint. sed si diversae materiae sint et ob id propria species facta sit, forte ex vino et melle mulsum aut ex auro et argento electrum, idem iuris est: nam et eo casu communem esse speciem non dubitatur. quodsi fortuitu et non voluntate dominorum confusae fuerint vel diversae materiae vel quae eiusdem generis sunt, idem iuris esse placuit. Quodsi frumentum Titii tuo 28 frumento mixtum fuerit, si quidem ex voluntate vestra, commune erit, quia singula corpora, id est singula grana, quae cuiusque propria fuerunt, ex consensu vestro communicata sunt. quodsi casu id mixtum fuerit vel Titius id miscuerit sine voluntate tua, non videtur commune esse, quia singula corpora in sua substantia durant nec magis istis casibus commune fit frumentum, quam grex communis esse intellegitur, si pecora Titii tuis pecoribus mixta fuerint: sed si ab alter-

G. ii. 79.

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accessio cannot affect the right to things 'quae singulae suam speciem retinent' or 'quae distant', but only to those which are so combined that the independent existence of the one is lost in the other ('quae cohaerent') Dig. 6. 1. 23. 5: when this is the case, and the one thing forms a whole by itself (i. e. is a res 'in qua propria qualitas spectatur', such as a cup, a statue, a ship, a building, a garment), it absorbs the other irrespective of the latter's relative value, Dig. 41. 1. 26. 1; ib. 27 pr., and the former owner of the purple cannot sue for it by real action (vindicatio) because its independent existence is gone. But, supposing the case to be one of theft (the definition of which was very wide, see on Bk. iv. 1. 1 inf.), he could bring the actio furti for the recovery of a penalty for the delict (ib. 19) and also the condictio furtiva for the value of the purple. If it was not theft, but the aliena purpura had been bona fide possessed by the person who wove it into his garment, the only action which would lie was a condictio sine causa, also applicable in the cases mentioned in the following sections, its ground being the enrichment of the one party at the expense of the other without any consideration, which affords the clue to the meaning of the 'quidam alii possessores'.

utro vestrum id totum frumentum retineatur, in rem quidem actio pro modo frumenti cuiusque competat, arbitrio autem iudicis continetur, ut is aestimet, quale cuiusque frumentum

29 fuerit. Cum in suo solo aliquis aliena materia aedificaverit,
Cf. G. ii. 73. ipse dominus intellegitur aedificii, quia omne quod inaedificatur solo cedit. nec tamen ideo is, qui materiae dominus fuerat, desinit eius dominus esse: sed tantisper neque vindicare eam potest neque ad exhibendum de ea re agere propter legem duodecim tabularum, qua cavetur, ne quis tignum alienum aedibus suis iniunctum eximere cogatur, sed duplum pro eo praestet per actionem quae vocatur de tigno iuncto (appellatione autem tigni omnis materia significatur, ex qua aedificia fiunt): quod ideo provisum est, ne aedificia rescindi necesse sit. sed si aliqua ex causa dirutum sit aedificium, poterit materiae dominus, si non fuerit duplum iam persecutus,

30 tunc eam vindicare et ad exhibendum agere. Ex diverso si quis in alieno solo sua materia domum aedificaverit, illius

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§ 29. It would seem that the materials were in this case subject to a double ownership: the person to whom they belonged before being used for building 'non desinit dominus eius esse', and yet the builder 'dominus intellegitur aedificii, quia omne quod inaedificatur solo cedit'. The solution of the difficulty lies perhaps in the notion of dominium dormiens or dormant rights, of which there is an illustration in Gaius iv. 78, or in the analogy of postliminium; cf. Dig. 6. 1. 59 'simul atque . . . dempta essent, continuo in pristinam causam reverti'. The actio de tigno iniuncto lay only where the materials of which the house was built had been stolen: 'sed in hoc solum agi potest, ut sola vindicatio soluta re competat mulieri, non in duplum ex lege duodecim tabularum: neque enim furtivum est, quod sciente domino inclusum est' Dig. 24. 1. 63. If the materials had been stolen the action lay against a bona fide possessor of the house no less than against the thief in possession himself: but, as is stated in the text, the former was not, like the latter, liable also to the actio ad exhibendum (for which see on Bk. iv. 6. 31 inf.) which entailed separation, and vindicatio. If they were not stolen, the only remedy available before separation was an actio in factum, Dig. 6. 1. 23. 5. Ihering (Vorgeschichte der Indo-Europäer, p. 135) believes that the enactment of the XII Tables proves that at that time wood was the only building material, and that this explains why that statute, in talking of usucapio of immoveables, speaks only of fundus, not of aedes.

§ 30. The principles laid down in this section cannot be applied between landlord and tenant, dominus and usufructuary, &c., in whose cases this matter of fixtures was regulated by rules specially governing such relations. The true position of a mala fide possessor of solum alienum

fit domus, cuius et solum est. sed hoc casu materiae dominus proprietatem eius amittit, quia voluntate eius alienata intellegitur, utique si non ignorabat in alieno solo se aedificare: et ideo, licet diruta sit domus, vindicare materiam non possit. certe illud constat, si in possessione constituto aedificatore soli dominus petat domum suam esse nec solvat pretium materiae et mercedes fabrorum, posse eum per exceptionem doli mali repelli, utique si bonae fidei possessor fuit qui aedificasset: nam scienti alienum esse solum potest culpa obici, quod temere aedificaverit in eo solo, quod intellegeret alienum esse. Si Titius alienam plantam in suo solo posuerit, ipsius 31
erit: et ex diverso si Titius suam plantam in Maevii solo Cf. G. ii. 74
posuerit, Maevii planta erit, si modo utroque casu radices egerit. antequam autem radices egerit, eius permanet, cuius et fuerat. adeo autem ex eo, ex quo radices agit planta, pro-

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who builds upon it with his own materials is somewhat contradictorily stated in the Corpus iuris, but the two following conclusions appear to be warranted: (1) provided he does not injure the soil he may raze the building and remove his materials, though he cannot claim compensation for his outlay (even by advancing the exceptio doli, Dig. 6. 1. 37), Cod. 8. 10. 5; 3. 32. 5; the passage of Paulus in which the latter right is affirmed (Dig. 5. 3. 38) relates to an exceptional case, and under ordinary circumstances would be overridden by the latter part of this section, as well as by Dig. 6. 1. 37, Cod. 3. 32. 5; ib. 16. (2) If the domus is diruta, he can bring vindicatio to recover the materials, unless it was animo donandi that he erected the building: 'sed et id quod in solo tuo aedificatum est, quoad in eadem causa manet, iure ad te pertinet: si vero fuerit dissolutum, materia eius ad pristinum dominium redit, sive bona sive mala fide aedificium exstructum sit, si non donandi animo aedificia alieno solo imposita sint' Cod. 3. 32. 2. It is true that this passage seems directly to contradict the text before us and Dig. 41. 1. 7. 12, but in both of these statements of the law the animus donandi must be taken to be implied. The general rule applicable in this and the four following sections as to improvements made by the possessor of a res aliena may be briefly stated thus: (1) every possessor (except the fur, Cod. 8. 52. 1) can demand compensation for impensae necessariae, Dig. 25. 1. 1; ib. 3; ib. 2 and 4; ib. 14 pr.; (2) for impensae utiles only the bona fide possessor is entitled to compensation, Dig. 41. 1. 7. 12; ib. 9 pr. and 1, though the value of fruits which he retains may be set off; (3) mala fide no less than bona fide possessors may, where possible, remove the results of their outlay; see the passages cited above.

§ **31**. Plants, cereals, &c. raised from seed belonged even after separation from the soil to the latter's owner, the reason why they were thus

prietas eius commutatur, ut, si vicini arborem ita terra Titii
presserit, ut in eius fundum radices ageret, Titii effici arborem
dicimus: rationem etenim non permittere, ut alterius arbor
esse intellegatur, quam cuius in fundum radices egisset. et
ideo prope confinium arbor posita si etiam in vicini fundum
32 radices egerit, communis fit. Qua ratione autem plantae,
Cf. G. ii. 75. quae terrae coalescunt, solo cedunt, eadem ratione frumenta
quoque, quae sata sunt, solo cedere intelleguntur. ceterum
sicut is qui in alieno solo aedificaverit, si ab eo dominus petat
Cf. G. ii. 76. aedificium, defendi potest per exceptionem doli mali secundum
ea quae diximus: ita eiusdem exceptionis auxilio tutus esse
potest is qui alienum fundum sua impensa bona fide consevit.
33 Litterae quoque, licet aureae sint, perinde chartis membranis-
Cf. G. ii. 77. que cedunt, acsi solo cedere solent ea quae inaedificantur aut
nseruntur: ideoque si in chartis membranisve tuis carmen
vel historiam vel orationem Titius scripserit, huius corporis
non Titius, sed tu dominus esse iudiceris. sed si a Titio petas
tuos libros tuasve membranas esse nec impensam scripturae
solvere paratus sis, poterit se Titius defendere per exceptionem
doli mali, utique si bona fide earum chartarum membrana-
34 rumve possessionem nanctus est. Si quis in aliena tabula
Cf. G. ii. 78. pinxerit, quidam putant tabulam picturae cedere: aliis vide-
tur picturam, qualiscumque sit, tabulae cedere. sed nobis
videtur melius esse tabulam picturae cedere: ridiculum est
enim picturam Apellis vel Parrhasii in accessionem vilissimae
tabulae cedere. unde si a domino tabulae imaginem possi-

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treated differently from materials used for building being that they were no longer what they had been: 'nam credibile est alio terrae alimento aliam factam' Dig. 41. 1. 26. 1.

§ 34. Gaius (ii. 78) remarks on the unreasonableness of treating paintings differently from writings, and in Dig. 6. 1. 23. 3 exactly the opposite rule is stated by Paulus, 'sed necesse est ei rei (sc. tabulae) cedi, quod sine illa esse non potest;' but there is no doubt that the anomaly was supported by great weight of legal opinion. If the painter had possession of the tabula, the latter's former owner could bring only a utilis rei vindicatio, because in point of fact he was its owner no longer: and even then, if the painter's possession was bona fide, the latter could meet him with the exceptio doli or plea of fraud, if he refused to pay the value of the painting, Dig. 6. 1. 23. 4, and could even exclude the action altogether by himself offering to pay the value of the board. The actio furti lay only against the thief.

dente is qui pinxit eam petat nec solvat pretium tabulae, poterit per exceptionem doli mali summoveri: at si is qui pinxit possideat, **consequens est, ut utilis actio** domino tabulae G. ii. 78. adversus eum detur, **quo casu, si non solvat impensam picturae, poterit per exceptionem doli mali repelli, utique si bona fide possessor fuerit** ille qui picturam imposuit. **illud enim palam est, quod, sive is qui pinxit subripuit tabulas sive alius, competit domino tabularum furti actio.**

Si quis a non domino, quem dominum esse crederet, bona 35
fide fundum emerit vel ex donatione aliave qua iusta causa

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§ 35. A fourth natural mode of acquisition is fructuum perceptio, as exemplified in those persons who derive their right to take fruits from the consent of the owner, especially the usufructuary and lessee (colonus, § 35 inf.). The rights of other persons to fruits were based on other titles. The dominus of a fruit-bearing object (e.g. land) is entitled to the fruits, while still unseparated, as part of the land itself: after separation, as a consequence of his property in the soil. The title, or rather the quality of the right, is not the same before and after separation: for the fructus separati of an estate which a man has only in bonis belong to him ex iure Quiritium. The title of the emphyteuta (Excursus II at the end of this Book) was separation: 'sicut eius qui vectigalem fundum habet fructus fiunt simul atque solo separati sunt' Dig. 22. 1. 25. 1: the reason of his being differently treated from the lessee being the larger nature of his interest, evidenced also by his having a vindicatio utilis. The precise rights of the bona fide possessor (i.e. one who has obtained a res aliena by a iustus titulus, usually from another whom he believed to have the right of alienation) are much disputed: but the better opinion seems to be that he became complete owner of all fruits whatsoever (though not of accessions) by the mere fact of separation: 'Iulianus ait, fructuarii fructus tunc fieri, cum eos perceperit: bonae fidei possessoris mox cum a solo separati sunt' Dig. 7. 4. 13: cf. Dig. 22. 1. 25. 1; 41. 1. 48 pr. If this be correct, the words quos percepit in this section must be read as if they were 'qui separati sunt'. If, however, the dominus was successful in a vindicatio against the bona fide possessor, the latter had to restore fructus extantes (i. e. separati but not consumpti, Bk. iv. 17. 2 inf.), but for fructus consumpti, as is observed in the text, he was not answerable; under consumptio being included specification and alienation. Of accessions, as of the main object, he was bona fide possessor only: hence as the partus ancillae is not fructus (§ 37 inf.) it became the property of the ancilla's bona fide possessor only by usucapio. The mala fide possessor acquired no right to fruits in any way whatsoever, so that if the dominus established his title against him, he could be compelled to restore fructus extantes by vindicatio, and the value of fructus consumpti (from the very commencement of his possession) could be recovered from him by condictio, Dig. 13. 7. 22. 2; Cod. 4. 9. 3; 9. 32. 4.

aeque bona fide acceperit: naturali ratione placuit fructus quos percepit eius esse pro cultura et cura. et ideo si postea dominus supervenerit et fundum vindicet, de fructibus ab eo consumptis agere non potest. ei vero, qui sciens alienum fundum possederit, non idem concessum est. itaque cum fundo
36 etiam fructus, licet consumpti sint, cogitur restituere. Is, ad quem usus fructus fundi pertinet, non aliter fructuum dominus efficitur, quam si eos ipse perceperit. et ideo licet maturis fructibus, nondum tamen perceptis decesserit, ad heredem eius non pertinent, sed domino proprietatis adquiruntur. eadem
37 fere et de colono dicuntur. In pecudum fructu etiam fetus est, sicuti lac et pilus et lana: itaque agni et haedi et vituli et equuli statim naturali iure dominii sunt fructuarii. partus vero ancillae in fructu non est itaque ad dominum proprietatis

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§ 36. By perceptio, as indicating the moment of acquisition, is meant the actual taking of possession; 'percipere est in potestatem suam redigere,' or (as Paulus says in Dig. 6. 1. 78) 'colligere: fructum percipi . . . foeno caeso . . . uva adempta . . . quamvis nondum vindemia coacta sit' Dig. 7. 4. 13, 'non si perfecti collecti, sed etiam coepti ita percipi, ut terra continere se fructus desierint' Dig. 6. 1. 78. Colonus here denotes the lessee of land, that of a house being called inquilinus: for another sense of the word see on Bk. i. 3. 5 supr. The difference between the colonus and the usufructuary marked by the word 'fere' seems to be that the right of the former devolved on his heirs.

§ 37. The first lines of this section are taken substantially from Dig. 22. 1. 28 pr. ('itaque agni et haedi et vituli statim pleno iure sunt bonae fidei possessoris et fructuarii'), and might, if the 'statim' were pressed, seem to contradict the rule that fruits become the property of the fructuary only by perceptio, at any rate as regards such fruits as the young of animals. The statim may be reconciled with that rule by taking it to mean either merely that usucapio is not necessary to perfect the fructuary's title, or that the requirements of perceptio are satisfied if the mother, at the time of the birth, is under his care and charge. Nor can pleno iure be pressed in relation to the bona fide possessor, owing to his obligation to restore fructus extantes.

For the question whether partus ancillae can be regarded as fructus cf. Cicero, de Fin. 1. 4. 2, Dig. 7. 1. 68 pr. and 1.

Fructus naturales are distinguished from the so-called fructus civiles, by which is meant the return made for the use of a res aliena: 'praediorum urbanorum pensiones pro fructibus accipiuntur' Dig. 22. 1. 36, 'mercedes plane a colonis acceptae loco sunt fructuum: operae quoque servorum in eadem erunt causa, qua sunt pensiones; item vectura navium et iumentorum' Dig. 5. 3. 29, 'usurae vicem fructuum obtinent' Dig. 22. 1. 34.

pertinet: absurdum enim videbatur hominem in fructu esse, cum omnes fructus rerum natura hominum gratia comparavit. Sed si gregis usum fructum quis habeat, in locum demortuo- 38 rum capitum ex fetu fructuarius summittere debet, ut et Iuliano visum est, et in vinearum demortuarum vel arborum locum alias debet substituere. recte enim colere debet et quasi bonus pater familias uti debet.

Thesauros, quos quis in suo loco invenerit, divus Hadrianus 39 naturalem aequitatem secutus ei concessit qui invenerit. idemque statuit, si quis in sacro aut in religioso loco fortuito casu invenerit. at si quis in alieno loco non data ad hoc opera, sed fortuitu invenerit, dimidium domino soli concessit. et convenienter, si quis in Caesaris loco invenerit, dimidium inventoris, dimidium Caesaris esse statuit. cui conveniens est, ut, si quis in publico loco vel fiscali invenerit, dimidium ipsius esse, dimidium fisci vel civitatis.

Per traditionem quoque iure naturali res nobis adquiruntur: 40 nihil enim tam conveniens est naturali aequitati, quam voluntatem domini, volentis rem suam in alium transferre, ratam haberi. et ideo cuiuscumque generis sit corporalis res, tradi

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§ 39. Thesaurus is defined as 'vetus quaedam depositio pecuniae, cuius non extat memoria, ut iam dominum non habeat, sic enim fit eius qui invenerit, quod non alterius sit: alioquin si quis aliquid vel lucri causa, vel metus, vel custodiae condiderit sub terra, non est thesaurus, cuius etiam furtum est' Dig. 41. 1. 31. 1: but valuables other than money were included in the notion: 'thesaurum . . . id est condita ab ignotis dominis tempore vetustiore mobilia' Cod. 10. 15. 1. 1. If A found a treasure on B's land otherwise than by accident it belonged altogether to B. It would seem that the English rule, which vests treasure-trove in the Crown (3 Inst. 132), was established also at Rome at some time after the legislation of Hadrian referred to in the text (for which cf. Spartianus, Hadr. 18); thus it is mentioned as a special act of grace on the part of the Emperor Alexander that he permitted thesaurus to be kept by the finder. Possibly it was the concealment of such discoveries which must have resulted from this privilege of the fiscus that led to Constantine's general enactment (Cod. Theod. 10. 18. 1) rewarding the finder with a half. Hadrian's rule was re-established by Leo, whose constitution passed into the legislation of Justinian, Cod. 10. 15.

§ 40. A fifth natural mode of acquisition is traditio, bare delivery without any prescribed form, which after Justinian's abolition of the distinction between Quiritarian and bonitarian ownership remained the universal mode of conveying property in res corporales. No mere mental

G. ii. 21. potest et a domino tradita alienatur. **itaque stipendiaria quoque et tributaria praedia eodem modo alienantur.** vocan-

act was sufficient for this purpose: there must be corporeal delivery: 'traditionibus et usucapionibus dominia rerum, non nudis pactis transferuntur' Cod. 2. 3. 20. The only exception to this rule in Roman law is societas omnium bonorum (for which see on Bk. iii. 25 pr. inf.), though iura in re aliena could be created by bare agreement, as in hypotheca, and perhaps in servitudes generally, see on Tit. 3. 4 inf. Traditio, however, by itself transferred only possession; the dominium of an object passed only if the transferor was owner (for which see inf.), and the delivery was accompanied by a iusta causa traditionis, i.e. the intention on the one hand to give, on the other to receive ownership: 'nunquam nuda traditio transfert dominium, sed ita, si venditio vel aliqua iusta causa praecesserit, propter quam traditio sequeretur' Dig. 41. 1. 31 pr. Among such causae, besides venditio, dos, and donatio, which are mentioned in the text, may be enumerated solutio (payment), mutuum (loan), and permutatio (exchange). Though the causa usually existed contemporaneously with the delivery, it might arise subsequently, as in the cases mentioned in § 44 inf., in which the result of the traditio by itself was either mere detention (as in deposit), or civil possession (as in pignus and precarium); the causa superveniens converted this into dominium. Provided there was a sufficient causa, a mistake of the parties as to the real nature of the transaction did not prevent the property from passing: thus if A thinks he is paying B a debt, while the latter thinks he is making him a present, the property passes to B, and he becomes owner of the res tradita, for this was intended by both, though the transaction is neither gift nor payment, Dig. 41. 1. 36.

According to the general rule that no one can give a better title than he has himself, the owner alone could usually transfer dominium: 'traditio nihil amplius transferre debet, vel potest, ad eum qui accepit, quam est apud eum qui tradit: si igitur quis dominium in fundo habuit, id tradendo transfert, si non habuit, ad eum, qui accipit, nihil transfert' Dig. 41. 1. 20 pr. Some apparent exceptions to this are explained by the transferor's being actually (§ 42 inf.) or constructively the owner's agent (e. g. his tutor, curator, or pledgee); a real exception is found in the sale of res alienae by the fiscus (Tit. 6. 14 inf.). In some cases even the owner could not convey, either because he was incapable of performing legal acts (Handlungsunfähigkeit), or because he was by law prohibited from the management of his own property (e.g. prodigi), or because his alienation was nullified by positive enactment, Tit. 8 inf.

'Stipendiaria (praedia) sunt ea, quae in provinciis sunt quae propriae populi Romani esse intelleguntur; tributaria sunt ea quae propriae Caesaris esse creduntur' Gaius ii. 21. Italian soil was a res mancipi, and therefore property in it could not be conveyed by traditio. The distinction of tributary and stipendiary provinces was merely nominal in Gaius' time, and ceased entirely about the end of the second century; see Mr. Poste's note on the passage of Gaius just cited.

tur autem **stipendiaria et tributaria praedia, quae in provinciis sunt**, inter quae nec non Italica praedia ex nostra constitutione nulla differentia est. Sed si quidem ex causa donationis aut 41
dotis aut qualibet alia ex causa tradantur, sine dubio transferuntur: venditae vero et traditae non aliter emptori adquiruntur, quam si is venditori pretium solverit vel alio modo ei satisfecerit, veluti expromissore aut pignore dato. quod cavetur quidem etiam lege duodecim tabularum: tamen recte dicitur et iure gentium, id est iure naturali, id effici. sed si is qui vendidit fidem emptoris secutus fuerit, dicendum est statim rem emptoris fieri. Nihil autem interest, utrum ipse 42
dominus tradat alicui rem, an voluntate eius alius. Qua 43
ratione, si cui libera negotiorum administratio a domino permissa fuerit isque ex his negotiis rem vendiderit et tradiderit, facit eam accipientis. Interdum etiam sine traditione nuda 44
voluntas sufficit domini ad rem transferendam, veluti si rem, quam tibi aliquis commodavit aut locavit aut apud te deposuit, vendiderit tibi aut donaverit. quamvis enim ex ea causa tibi eam non tradiderit, eo tamen ipso, quod patitur tuam esse,

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§ 41. The word 'traditae' in this passage seems to be what is called a 'Tribonianism'. Voigt (XII Tafeln, p. 709) supposes that the rule of the Twelve Tables ran 'venditae et mancipatae res non aliter emptori adquiruntur quam si is venditori pretium solverit aut iustum vadem dederit': cf. his Ius Naturale, Beilage xxi. § 18. The rule of the Twelve Tables seems to prove that at that date the weighing out of the copper representing the price had already become, at any rate in many cases, fictitious. For the general statement in the text cf. Varro, de Re Rust. 2. 2. 26; Quintil. Decl. 336; Dig. 18. 1. 19. Some commentators account for the rule by considerations of the incompleteness of the old Roman law of contract: some suppose it to have been derived from Greece; others find in it a rule of construction only, the intention to transfer ownership being presumed to be absent unless one of the three specified conditions is satisfied. The last two lines of the section must not be taken to mean that if the vendor gives credit the property immediately passes to the vendee without traditio: from the expression 'venditae res et traditae' supr. it is clear that vendidit here means vendidit et tradidit. This rule about giving credit is clearly of later date than the Twelve Tables. For the expromissor (surety) see Bk. iii. 20 inf.; for pignus, Excursus II, at the end of this Book.

§ 43. From a comparison of Dig. 3. 3. 58 with ib. 63 it would seem that an agent entrusted with a libera administratio had wider powers than one whose authority was undefined.

§ 44. Cf. Dig. 41. 1. 9. 5; ib. 21. 1; 41. 2. 3. 3. 'Solo animo non posse nos adquirere possessionem, si non antecedat naturalis possessio.'

statim adquiritur tibi proprietas perinde ac si eo nomine
45 tradita fuisset. Item si quis merces in horreo depositas
vendiderit, simul atque claves horrei tradiderit emptori,
46 transfert proprietatem mercium ad emptorem. Hoc amplius
interdum et in incertam personam collocata voluntas domini
transfert rei proprietatem: ut ecce praetores vel consules,
qui missilia iactant in vulgus, ignorant, quid eorum quisque
excepturus sit, et tamen, quia volunt quod quisque exceperit
47 eius esse statim eum dominum efficiunt. Qua ratione verius
esse videtur et, si rem pro derelicto a domino habitam occu-
paverit quis, statim eum dominum effici. pro derelicto autem
habetur, quod dominus ea mente abiecerit, ut id rerum suarum
48 esse nollet, ideoque statim dominus esse desinit. Alia causa
est earum rerum, quae in tempestate maris levandae navis
causa eiciuntur. hae enim dominorum permanent, quia palam

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§ 45. The keys must be delivered apud horrea, Dig. 18. 1. 74: in praesentia, Dig. 41. 2. 1. 21. Many commentators regarded traditio of the keys as a *symbolical* traditio of the contents of the building, in the same way as the handing over the keys of a town to a king on his entry symbolised the surrender of the town itself. But Savigny has shown (Possession § 14) that what is essential is not so much the transfer of the thing itself as the enabling of the transferee to exercise exclusive control over it; cf. Cic. Philipp. 2. 28.

§ 46. The case put in the text is a genuine traditio: for the transferee is intended, though indefinitely: the transferor contemplates somebody or other in the crowd before him as the receiver. But in the next paragraph the circumstances are different; the person who may take possession of the res derelicta is absolutely uncertain, and does not conceive the abandonment as made in his favour at all.

§ 47. For dereliction see on § 12 supr. The opinion that the prior ownership ceased immediately with the abandonment, confirmed here by Justinian, had been that of the Sabinians; the Proculian school construed the act of abandonment as one which made acquisition of ownership by occupatio possible, but divested the owner of his property only when the occupatio had supervened, Dig. 41. 7. 2. 1. Observe that to get rid of one's dominium an overt act (abiecerit) is requisite besides intention (nollet); to lose possession it was different: 'dominium nihilominus eius manet, qui dominus esse non vult: possessio autem recedit' Dig. 41. 2. 17. 1. The mere finding of property gave no title, Dig. 6. 1. 67, and appropriation of it was theft, Dig. 47. 2. 43. 4.

§ 48. Cf. Aristotle, Ethics iii. 1. The lex Rhodia de iactu provided that when property was thrown overboard to lighten and thereby save a ship, a proportionate share of the loss should be borne by the owners of the ship and cargo saved; Dig. 14. 2. 1, Paul. Sent. Rec. 2. 7.

est eas non eo animo eici, quo quis eas habere non vult, sed quo magis cum ipsa nave periculum maris effugiat: qua de causa si quis eas fluctibus expulsas vel etiam in ipso mari nactus lucrandi animo abstulerit, furtum committit. nec longe discedere videntur ab his, quae de rheda currente non intellegentibus dominis cadunt.

II

DE REBUS INCORPORALIBUS

Quaedam praeterea res corporales sunt, quaedam incor- G. ii. 12.
porales. Corporales eae sunt, quae sui natura **tangi possunt:** 1
veluti fundus homo vestis aurum argentum et denique aliae G. ii. 13.
res innumerabiles. Incorporales autem sunt, quae tangi non 2
possunt. qualia sunt ea, quae in iure consistunt: sicut here- G. ii. 14.
ditas, usus fructus, obligationes quoquo modo contractae. nec
ad rem pertinet, quod in hereditate res corporales continentur:

Tit. II. The division of res into corporeal and incorporeal was in origin a philosophical one derived from the Stoics (Diog. Laert. 7. 140, 141): 'rerum definitionum autem duo sunt genera: unum earum rerum, quae sunt, alterum earum rerum, quae intelleguntur. Esse ea dico, quae cerni tangive possunt: non esse rursus ea dico, quae tangi demonstrarive non possunt, cerni tamen animo atque intellegi possunt' Cic. Top. 5. If this distinction is to be used in law, it must be remembered that a res which is, philosophically, corporalis or incorporalis need not be either legally; it becomes so only if the law takes notice of it. Thus the sea is a res corporalis in Cicero's sense, but not in that of the Roman lawyer; it cannot be the object of rights. Similarly many objects of the intelligence have no legal existence whatever.

By res corporalis (sensu legali) is to be understood any limited portion of external nature which is not a person, or any tangible object over which ownership can be asserted in a real action: by res incorporalis is to be understood any legal right except the right of ownership itself. When Gaius (from whom, ii. 12–14, Justinian literally transcribes the whole of this Title) describes obligatio and hereditas as res incorporales, he explains that he means the right of the creditor in the former case, and in the latter the right of the person to whom the hereditas is delata to become heres actually by acceptance. Why Gaius excludes the right of dominium alone from the category of res incorporales is explained by Mr. Poste (Gaius, p. 150) by reference to the Roman system of pleading, under which, in an action asserting ownership over an object, the object itself was brought into the foreground of the formula, whereas, in the formulae of all other actions, whether real (asserting a ius in re aliena) or personal, the stress was laid, explicitly or implicitly, on the existence of the plaintiff's right. But perhaps the true explanation of the seeming

nam et fructus, qui ex fundo percipiuntur, corporales sunt et id, quod ex aliqua obligatione nobis debetur, plerumque corporale est, veluti fundus homo pecunia: nam ipsum ius hereditatis et ipsum ius utendi fruendi et ipsum ius
3 obligationis incorporale est. Eodem numero sunt iura prae-

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anomaly is that given by Dr. Hunter (Roman Law, p. 142), who points out that the most striking difference between the right of dominium, and all other rights, was that the former could be transferred only by actual delivery of the object, which for the conveyance of the latter was unnecessary and often impossible.

§ 3. A right over a definite tangible object is called a ius in re, or real right: if the object be our own, it is ius in re propria: if some one's else, ius in re aliena. The rights comprised in the complex notion of dominium are so indefinite that no satisfactory enumeration of them seems possible (see Holland's Jurisprudence, p. 133); conceivably, any one or more of these might be separated from the rest, and vested in some other person than the dominus, so as to become a ius in re aliena: but practically no system of law recognises by specific names and rules more than a limited number of such rights. Those known to Roman law are divided into (1) those which were recognised by the old civil law, and which are called generically servitudes, and (2) those which were not so recognised, and are denoted by specific names.

Servitudes are either praedial (divided into rustic and urban) or personal, the latter comprising usus, ususfructus, habitatio, and operae servorum or animalium; the former are the older, and consequently are sometimes called servitutes par excellence, e.g. Dig. 9. 7. 4. 2. The second class of iura in re aliena consists of three distinct rights, emphyteusis, superficies, and pignus.

Properly speaking, the term servitus denotes the quasi-nonfree condition of an object over which rights are enjoyed by a person other than its owner ('posteaquam ius suum deminuit, alterius auxit, hoc est, posteaquam servitutem aedibus suis imposuit' Dig. 39. 1. 5. 9); but more commonly it is used to express the deducted right itself. So understood, it may be defined as a real right, vested in or annexed to a definite person or piece of land, over some object belonging to another, and limiting the enjoyment of that object by that other in a definite manner. The following general points deserve notice:—

(1) Servitudes may be either positive or negative, the former being said to consist in patiendo (i.e. the dominus has to allow the other party to do something from which otherwise he could legally hinder him, such as walking across his field), the latter in non faciendo (the dominus being obliged to refrain from doing some act which otherwise he would be at perfect liberty to do, e.g. servitus altius non tollendi, inf.). But no servitude can consist in faciendo; in other words, the obligation of the dominus cannot be to perform some positive duty, for this would give rise to a right in personam only, whereas a servitude is a right in rem,

diorum urbanorum et rusticorum, quae etiam servitutes vocantur.

Dig. 8. 1. 15. 1. (2) The right of servitude is extinguished so soon as the person in whom it is vested becomes dominus of the res serviens, or vice versa: 'nulli res sua servit' Dig. 8. 2. 26. (3) One servitude cannot be the object of another: 'servitus servitutis esse non potest' Dig. 33. 2. 1. (4) A servitude must not merely limit the rights of the dominus, but it must confer a positive advantage on the other party, Dig. 8. 1. 15 pr. (5) Servitudes being created solely for the advantage of a definite subject, they are intransferable, or inseparable from the subject itself, Dig. 10. 2. 15; 8. 4. 12.

The meaning of the distinction between praedial (or real) and personal servitudes is explained in § 3 of the next Title. (1) A praedial servitude can belong to a man only as being owner of a parcel of land or a house (praedium); he can have a personal servitude without any such limitation. The latter can be enjoyed over any object of property; the former only over another praedium, near to (vicinum) but not necessarily adjoining that in whose favour it exists, and to which it is appurtenant: Dig. 8. 3. 5. 1; 8. 5. 2. 1; ib. 3. Thus there cannot be a praedial servitude without two praedia, Tit. 3. 3 inf., called the praedium dominans and the praedium serviens. (2) The right must be of such a nature that by it the use and enjoyment of the praedium dominans is increased, or rendered more complete and effectual. It is consequently inseparable from the latter, passing with it when conveyed, and its maximum extent or orbit is determined only by the requirements of the praedium to which it is attached, Dig. 8. 3. 5. 1. (3) But the owner of the praedium dominans must exercise his right with proper regard for the other party, civiliter modo, Dig. 8. 1. 9, while the latter is bound to permit him to do all acts necessary for its due enjoyment, such as repairs, ib. 10. (4) The nature of a praedial servitude is further illustrated by the rule 'omnes servitutes praediorum perpetuas causas habere debent' Dig. 8. 2. 28; i.e. no right can be a praedial servitude whose enjoyment necessitates constant action on the part of the owner of the praedium serviens, or which can in the nature of things be enjoyed only for a limited time, 'ideo neque ex lacu neque ex stagno concedi aquae ductus potest' Dig. loc. cit. (5) 'Servitutes (praediorum) ipso quidem iure neque ex tempore, neque ad tempus, neque sub condicione, neque ad certam condicionem constitui possunt' Dig. 8. 1. 4 pr.

Different views are held as to the rationale of the division of praedial servitudes into rustic and urban. According to Justinian, Tit. 3. 1 inf., it turns upon the nature of the praedium dominans, the question being whether this is a building merely, or a piece of land comparatively free from buildings, such as a farm or a country estate: others regard only the nature of the praedium serviens; while a third school determines the species of servitude purely by reference to its content, holding that where the right is to do something, it is rustic, where it consists in habendo or prohibendo, urban. The following Titles will make the distinction clear.

III

DE SERVITUTIBUS

G. ii. 14. **Rusticorum praediorum iura sunt haec : iter actus via aquae ductus.** iter est ius eundi ambulandi homini, non etiam iumentum agendi vel vehiculum : actus est ius agendi vel iumentum vel vehiculum. itaque qui iter habet, actum non habet. qui actum habet, et iter habet eoque uti potest etiam sine iumento. via est ius eundi et agendi et ambulandi : nam et iter et actum in se via continet. aquae
1 ductus est ius aquae ducendae per fundum alienum. **Praediorum urbanorum** sunt servitutes, quae aedificiis inhaerent, ideo urbanorum praediorum dictae, quoniam aedificia omnia urbana praedia appellantur, etsi in villa aedificata sunt. item praediorum urbanorum servitutes sunt hae : ut vicinus onera vicini sustineat : ut in parietem eius liceat vicino tignum immittere : **ut stillicidium vel flumen recipiat quis in aedes suas vel in aream**, vel non recipiat : et ne altius tollat

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Tit. III. Via differs from iter and actus (1) in implying a regular roadway, the minimum width of which, in the absence of express agreement, was fixed by law at eight feet where straight, and sixteen where it curved, Dig. 8. 3. 8 ; (2) in entitling one to the use of the road for heavy traffic, which is expressly excluded from actus in Dig. ib. 7 pr. Iter, unless otherwise specified, included the right of riding or being carried in a litter, ib. 7 and 12 ; and though actus usually comprehended iter, it could be excluded by express agreement, Dig. 8. 5. 4. 1. In all of these three rights of way the person entitled might use only the road or path assigned to him by the owner of the praedium serviens, or that which he had once selected for himself.

§ 1. In Dig. 8. 1. 3 Paulus seems to define urban servitudes as those quae in superficie, as contrasted with those quae in solo, consistunt. They are either positive, e.g. tigni immittendi, oneris ferendi, stillicidii avertendi, proiiciendi (right of building some structure such as a balcony out over one's neighbour's land) and cloacae—or negative, securing an advantage to the praedium dominans of which it could be deprived by some alteration in the praedium serviens, e.g. altius non tollendi, the right of preventing one's neighbour from raising the height of his house, and ne luminibus or prospectui officiatur.

In this section, as well as in Gaius ii. 31, iv. 3, and many passages of the Digest (e.g. 8. 2. 1 pr. ; 8. 3. 2 pr. ; 8. 4. 7. 1 ; 44. 2. 26 pr.), an urban servitude is mentioned which has occasioned considerable difficulty, viz. the servitudes altius tollendi, officiendi luminibus vicini, and stillicidii non avertendi, which seem to operate only in the way of freeing a building from some pre-existing obligation. Mr. Poste (Gaius, p. 168) explains

quis aedes suas, **ne luminibus vicini officiatur.** In rusti- 2
corum praediorum servitutes quidam computari recte putant aquae haustum, pecoris ad aquam adpulsum, ius pascendi, calcis coquendae, harenae fodiendae.

Ideo autem hae servitutes praediorum appellantur, quoniam 3
sine praediis constitui non possunt. nemo enim potest servitutem adquirere urbani vel rustici praedii, nisi qui habet
praedium, nec quisquam debere, nisi qui habet praedium. Si 4
quis velit vicino aliquod ius constituere, pactionibus atque

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this by supposing that an urban servitude can be extinguished only by the acquisition of a contrary servitude by the praedium serviens. But perhaps it is better to suppose that these anomalous servitudes occurred only where the laws limited the rights of owners by forbidding them to build above a certain height, compelling them to receive their neighbour's rainwater, etc.: see Girard, 4th ed. p. 358, note 6. A law of Zeno of this nature, enacted originally for Constantinople only, was extended to all the cities of the empire by Justinian (Cod. 8. 10. 12 and 13). If this is so, it is difficult to conceive the right in question as a servitude at all.

§ 2. The rights mentioned in this section are treated as rustic servitudes by Neratius (Dig. 8. 3. 2 sq.), and by Papinian, Paulus, and Ulpian. The word 'recte' seems to imply that by some they were not so considered, though there is no trace in the authorities of a difference of opinion.

§ 4. The old mode of constituting servitudes between the parties had been in iure cessio, Gaius ii. 29, 30, rustic servitudes in Italy also admitting of creation by mancipatio. These processes, however, could be employed only in respect of objects which could themselves be transferred in the same manner, so that (Gaius ii. 31) servitudes over praedia provincialia, which were not 'in patrimonio', could not thus be created. In default, the occupiers of land in the provinces resorted to bare agreements (pactio), subsequently expressed in a formal and solemn contract (stipulatio), by which the owner of the land which was to be subjected to the servitude bound himself to allow its enjoyment, or in default to pay a penal sum, e.g. 'per te non fieri neque per heredem tuum, quominus mihi heredique meo ire agere liceat; si adversus ea factum sit, tantum dari' Dig. 45. 1. 2. 5. A right thus created could not in itself avail in rem, or 'run with the land'; yet it seems clear from Gaius (ii. 31) that in his time such pactiones and stipulationes were as effectual to create servitudes over provincial soil as in iure cessio and mancipatio over praedia Italica. We must consequently suppose that the provincial governors had intervened, and by the introduction of an utilis actio (confessoria) for the protection of the promisee against all successors of the other in title had given the right a genuine 'real' character. In Justinian's time of course pactio et stipulatio was the sole mode of contractually creating servitudes of every kind.

stipulationibus id efficere debet. potest etiam in testamento

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There is much difference of opinion as to whether, in addition to the pactio et stipulatio, a quasi-traditio of the right was required to endow it with the full proportions of a servitude. Gaius expressly says (ii. 28) that servitudes, like res incorporales in general, do not admit of traditio; but if the latter be conceived as the granting of the physical control over a thing, or as the permitting it to be enjoyed, servitudes will also admit of this figurative operation, and accordingly many hold that as bonitarian ownership at least could always be conveyed by traditio proper, so pactio et stipulatio required the supplement of this quasi- or figurative traditio to gain full praetorian protection for the right created, as a 'real' right. For instance, it is affirmed that this traditio gave a quasi-possession, entitling the recipient to use the Publician action, as well as the actio confessoria, whereby he was exempted from the onus of proving his transferor's title, and which availed also against non-owners of the praedium serviens. It is quite certain that in many passages (e. g. Dig. 6. 2. 11. 1; 7. 1. 25. 7; 7. 4. 1 pr.; 7. 6. 3; 8. 1. 20) traditio is specified as a mode of creating servitudes; but obviously it must have been preceded by agreement, and the question is whether a real right could be created by the latter unsupplemented by the former. There is no passage in the authorities which affirms the necessity of traditio, and the prevailing view now seems to be that it was not essential; though the contrary is still maintained by some who argue from the jural impossibility of creating real rights by a contract 'in the proper sense of the term', and explain the absence of passages affirming the necessity of traditio by the consideration that in the time of the classical jurists servitudes were, iure civili, not thus created at all. Cf. Mr. Roby's edition of Dig. 7. 1, pp. 36, 174–175.

The other modes in which servitudes in general could originate are:—

(1) Testamentary disposition or legacy; this was commonest in personal servitudes, especially usufruct, which could either be bequeathed directly (Tit. 4. 1 inf.), or the heir could be directed to create it in favour of the legatee: 'ususfructus uniuscuiusque rei legari potest, et aut ipso iure constituetur aut per heredem praestabitur: ex causa damnationis per heredem praestabitur, ipso iure per vindicationem' Paul. Sent. Rec. 3. 6. 17. Bequest of praedial servitudes, to be duly constituted by the heir, is spoken of in this section; cf. Dig. 8. 4. 16; 33. 3.

(2) Deductio; reservation of the servitude in conveying the dominium either inter vivos or by will; Tit. 4. 1 inf., Fragm. Vat. 47. 50. 80; Dig. 7. 1. 36. 1; ib. 54; Gaius ii. 33.

(3) Judicial decision, either (*a*) by adiudicatio in a iudicium divisorium, Bk. iv. 6. 20; ib. 17. 4 and 5; (*b*) declaring a servitude duly constituted as against a recalcitrant defendant who refuses to create it himself; or (*c*) reviving by 'in integrum restitutio' a servitude which has been lost, Dig. 8. 5. 8. 4.

(4) In certain cases usufruct arose ipso iure in virtue of statutory enactment (lex); e. g. the pater's usufruct in the peculium adventitium

quis heredem suum damnare, ne altius tollat, ne luminibus

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of his son (note on Tit. 9 pr. inf.); Cod. 6. 60. 1 and 3; 6. 61. 6 pr.; 5. 9. 3 pr.; ib. 6. 1.

(5) Actual enjoyment of the right for a prescribed period of time. Where a praedium was acquired by usucapio (Tit. 6 inf.), the servitudes appurtenant to it were acquired along with it; but apart and by themselves, such rights could not thus arise, for usucapio presupposes possession of the thing to be acquired, and a bare right cannot be possessed: 'hoc iure utimur, ut servitutes per se nusquam longo tempore capi possint, cum aedificiis possint' Dig. 41. 3. 10. 1; cf. Dig. 8. 1. 14. It would seem, however, that at one time this principle was not fully admitted, probably because the earlier Romans were unable to distinguish between property and rustic servitudes, regarding the latter, as Cuq suggests, as res corporales, for a lex Scribonia of uncertain date (Dig. 41. 3. 4. 29) forbade usucapion of servitudes, except the anomalous class spoken of on § 1 supr.

Servitudes over provincial soil, however, could be acquired by an analogous institution of praetorian origin, more fully explained in Excursus III at the end of this Book, viz. longa quasi-possessio, actual exercise of the right for ten years if the owner of the praedium serviens lived in the same province, twenty if in another; Dig. 8. 5. 10 pr.; 39. 3. 1. 22. This mode of acquisition came to be recognised, through the Praetor's Edict, in Italy also, so that in effect the lex Scribonia lost much of its force: under Justinian it is in full operation for all kinds of servitudes, Cod. 7. 33. 12, its conditions being (*a*) uninterrupted enjoyment of the right for the periods specified, which (*b*) must not be violent, or without the knowledge of the other party, or in virtue of express permission from him; but bona fides and iusta causa do not seem necessary; Dig. 8. 5. 10 pr.; 8. 6. 24; 43. 20. 1. 10; cf. Roby, op. cit. p. 138.

Servitudes generally might be extinguished in the following ways:—

(1) Destruction of the res serviens (Tit. 4. 3 inf.), or its withdrawal from commercium. Personal servitudes perished also if the res serviens underwent a complete and essential transformation, Dig. 7. 4. 5. 2 and 3.

(2) Confusio, i.e. the dominium and the servitude becoming vested in one and the same person by operation of law. This occurred frequently in succession upon death.

(3) Surrender of the right to the dominus of the res serviens, Tit. 4. 3 inf. The proper form of surrender had originally been in iure cessio and for rustic servitudes in Italy probably also mancipatio; in Justinian's time a mere agreement (cessio or concessio) was sufficient without any formal surrender, the person who attempted to establish his right subsequently by action being met by an exceptio doli, Dig. 4. 12. 44. 4. So too the person entitled to the servitude might purchase the dominium, Dig. 7. 4. 17; this in Tit. 4. 3 inf. is called consolidatio. There is some ground for supposing that abandonment (derelictio) extinguished usufruct, though not other servitudes; but its effect seems really to have been to terminate, not the usufructuary's rights, but only his liabilities.

aedium vicini officiat: vel ut patiatur eum tignum in parietem

(4) Extinction of the subject entitled. In praedial servitudes this is the praedium dominans: personal servitudes expire with the death of the person in whom they are vested, unless granted to him and his heirs, or an earlier time has been fixed for their termination. If a personal servitude belonged to a juristic person, it could not endure beyond one hundred years except by express provision, Dig. 7. 1. 56.

(5) Non-exercise of the right for a prescribed time. Rustic servitudes were lost by non-exercise for two years, personal servitudes by non-user for one year or two according as the res serviens was mobilis or immobilis, Paul. Sent. Rec. 3. 6. 30. For the loss of an urban servitude mere non-user was insufficient; there was required also some positive act on the part of the owner of the praedium serviens, e.g. raising of the house, building up of the hole in which the beam had rested, etc.; two years after this had occurred the right was extinguished, this being called usucapio libertatis: 'haec autem iura [praediorum urbanorum] similiter, ut rusticorum quoque praediorum, certo tempore non utendo pereunt: nisi quod haec dissimilitudo est, quod non omnino pereunt non utendo, sed ita, si vicinus simul libertatem usucapiat' Dig. 8. 2. 6; cf Roby, op. cit. p. 139. For servitudes over provincial soil the periods were the longer ones already mentioned, and these continued to be required universally under Justinian, no distinction being drawn between moveables and immoveables; Cod. 3. 33. 16. 1; 3. 34. 13; 7. 33. 12. Two personal servitudes, habitatio and operae, were never liable to destruction by non-user.

(6) In Tit. 4. 3 inf. Justinian says usufruct was also extinguished 'non utendo per modum': which may be explained (1) as an allusion to Cod. 3. 33. 16. 1 'nec usumfructum non utendo cadere, nisi talis exceptio opponatur quae, etiamsi dominium vindicaret, posset eum excludere'; or (2) as referring to restrictions upon the right, limiting, e.g. the kinds of fruits which might be taken, cf. Dig. 8. 6. 10. 1; ib. 18 pr.

(7) Lapse of the time fixed for the duration of the right, or fulfilment of a resolutive condition. Praedial servitudes could not in strict law be qualified in this manner, but if the grantee asserted his right against the terms of the limitation, he could be defeated by exceptio pacti or doli, Dig. 8. 1. 4 pr.

(8) By the old law usus and ususfructus were extinguished by capitis deminutio of the person entitled, Gaius iii. 83. By an enactment of Justinian, capitis deminutio minima ceased to have this effect, Tit. 4. 3 inf. and Bk. iii. 10. 1; cf. Cod. 3. 33. 16. 2.

The remark of Gaius in ii. 30, and of the text in Tit. 4. 3 inf., that a right of usufruct is inalienable except by way of release to the owner of the res serviens is true of all servitudes whatever: any attempt to transfer was altogether inoperative. But a usufructuary, though he could not divest himself of his right in favour of a third person, could transfer its exercise or enjoyment to him by sale, gift, etc., Tit. 5. 1 inf.; Dig. 7. 12. 2; 18. 68. 2; 24. 3. 57. For the actions relating to servitudes see Bk. iv. 6. 2 and notes inf.

immittere vel stillicidium habere: vel ut patiatur eum per fundum ire agere aquamve ex eo ducere.

IV

DE USU FRUCTU

Usus fructus est ius alienis rebus utendi fruendi salva rerum substantia. est enim ius in corpore: quo sublato et ipsum tolli necesse est. Usus fructus a proprietate separationem **1** recipit idque plurimis modis accidit. ut ecce si quis alicui usum fructum legaverit: nam heres nudam habet proprietatem, legatarius usum fructum: et contra si fundum legaverit deducto usu fructu, legatarius nudam habet proprietatem, heres vero usum fructum: item alii usum fructum, alii deducto eo fundum legare potest. sine testamento vero si quis velit alii usum fructum constituere, pactionibus et stipulationibus id efficere debet. ne tamen in universum inutiles essent proprietates semper abscedente usu fructu, placuit certis modis extingui usum fructum et ad proprietatem reverti. Consti- **2**

Tit. IV. Usufruct is distinguished from usus by its greater orbit, the usufructuarius being entitled 'frui' as well as 'uti'. The differentia of the right thus lies in the word fructus, for which see Tit. 1. 37 supr. Subject to the obligation not to abuse or misuse ('recte enim colere debet, et quasi bonus paterfamilias' ib. 38), and in the absence of express provision to the contrary, the holder of the right may take all fruits of the object, civil as well as natural; and where it is land, he may ordinarily dig for minerals, Dig. 7. 1. 9. 2; ib. 13. 5, but not to such an extent as to violate the rule 'boni viri arbitratu uti frui debet, causam proprietatis deteriorem facere non debet'. His general obligations in this respect are contained in the expression 'salva rerum substantia', for which see Ulpian, Reg. 24. 26 'earum rerum, quarum salva substantia utendi fruendi potest esse facultas': he may not use the object over which his right exists for purposes clearly other than those for which it was designed, Dig. 7. 1. 13. 8; ib. 15. 1, though Justinian in the text seems to understand by the phrase merely destruction of the object, nor may he change its character, and he must restore it in as good condition as that in which he received it. Where the right was given testamento, the discharge of these obligations was secured by a cautio usufructuaria, or personal undertaking guaranteed by sureties: subsequently the dominus was held entitled to demand it in nearly all cases: Dig. 7. 9. 1 pr.; ib. 9. 1; 7. 1. 13 pr.

§ **1**. For the modes in which usufruct could be created and extinguished see notes on the preceding Title.

§ **2**. The date of the senatus-consult by which this 'quasi-usufruct' was introduced, though not precisely known, is supposed to lie between Cicero (on account of Top. 3 'non debet ea mulier, cui vir bonorum

tuitur autem usus fructus non tantum in fundo et aedibus, verum etiam in servis et iumentis ceterisque rebus exceptis his quae ipso usu consumuntur: nam eae neque naturali ratione neque civili recipiunt usum fructum. quo numero sunt vinum oleum frumentum vestimenta. quibus proxima est pecunia numerata: namque in ipso usu adsidua permutatione quodammodo extinguitur. sed utilitatis causa senatus censuit posse etiam earum rerum usum fructum constitui, ut tamen eo nomine heredi utiliter caveatur. itaque si pecuniae usus fructus legatus sit, ita datur legatario, ut eius fiat, et legatarius satisdat heredi de tanta pecunia restituenda, si morietur aut capite minuetur. ceterae quoque res ita traduntur legatario, ut eius fiant: sed aestimatis his satisdatur, ut, si morietur aut capite minuetur, tanta pecunia restituatur, quanti eae fuerint aestimatae. ergo senatus non fecit quidem earum rerum usum fructum (nec enim poterat), sed per cautionem quasi usum
3 fructum constituit. Finitur autem usus fructus morte fructuarii et duabus capitis deminutionibus, maxima et media, et non utendo per modum et tempus, quae omnia nostra
G. i. 30. statuit constitutio. item finitur usus fructus, si **domino proprietatis** ab usufructuario cedatur (nam **extraneo cedendo nihil agitur**): vel ex contrario si fructuarius proprietatem rei adquisierit, quae res consolidatio appellatur. eo amplius constat, si aedes incendio consumptae fuerint vel etiam terrae motu aut vitio suo corruerint, extingui usum fructum et ne

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suorum usumfructum legavit, cellis vinariis et oleariis plenis relictis, putare ad se pertinere, usus enim, non abusus legatus est') and the enactment of the lex Papia Poppaea, which often speaks of usufruct of a part of a whole property. Doubtless the main object of the innovation was to enable testators to bequeath a general usufruct over all their property. That the right was not a usufruct proper is clear from the text ('nec ususfructus est' Fragm. Vat. 46, 'non id effectum, ut pecuniae ususfructus proprie esset' Dig. 7. 5. 2. 1). Under the senatus-consult it could be created only by will ('ut omnium rerum, quas in cuiusque patrimonio esse constaret, ususfructus legari possit' Dig. 7. 5. 1), and was extinguished only by death and capitis deminutio of the person entitled, Dig. ib. 9 and 10.

§ 3. The jurists seem to have disagreed as to the effect of an attempt to cede a usufruct to a third person: Gaius (ii. 30) states the law in the same way as the text, and Fragm. Vat. 75, Dig. 10. 2. 15 agree; but in Dig. 23. 3. 66 Pomponius writes 'si extraneo cedatur, nihil ad eum

areae quidem usum fructum deberi. Cum autem finitus fuerit 4 usus fructus, revertitur scilicet ad proprietatem et ex eo tempore nudae proprietatis dominus incipit plenam habere in re potestatem.

V

DE USU ET HABITATIONE

Isdem istis modis, quibus usus fructus constituitur, etiam nudus usus constitui solet isdemque illis modis finitur, quibus et usus fructus desinit. Minus autem scilicet iuris in 1
usu est quam in usu fructu. namque is, qui fundi nudum usum habet, nihil ulterius habere intellegitur, quam ut oleribus pomis floribus feno stramentis lignis ad usum cottidianum utatur: in eoque fundo hactenus ei morari licet, ut neque domino fundi molestus sit neque his, per quos opera rustica fiunt, impedimento sit: nec ulli alii ius quod habet aut vendere aut locare aut gratis concedere potest, cum is qui usum fructum habet potest haec omnia facere. Item is, qui aedium usum habet, hactenus iuris habere intel- 2

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transire, sed ad dominum proprietatis reversurum usumfructum'. Some writers attempt to reconcile this with the passages last referred to: see Roby, op. cit. p. 82. Upon 'et ne areae quidem', etc., Theophilus says *ἐπειδὴ μὴ ἐδάφους, ἀλλ' οἰκίας αὐτῷ παρεχωρήθη ὁ οὐσουφρούκτος.*

Tit. V. The points wherein usus differed from usufruct are clearly pointed out in §§ 1–4. The commonest mode in which the right was created was testament, and upon the principle 'in testamentis plenius voluntates testantium interpretamur' the powers of the usuary were then sometimes enlarged beyond their normal compass in order to give effect to the bequest: e.g. if the usus were bequeathed of a wood, he might cut and sell it, Dig. 7. 8. 22 pr. On the same principle the legatee of the usus of a house might let such part of it as he did not require for himself and his family, Dig. ib. 2. 1, but not the whole: though the general rule was that a usuary could not transfer even the enjoyment of his right or any part of it, for to let another use a thing is not to use it oneself, and to do so for a merces is practically fructus.

§ **1.** For the transfer by a usufructuary of the actual enjoyment of his right see the concluding note on Tit. 3 supr.: 'alii fruendam concedere, vel locare, vel vendere potest (usufructuarius) . . . precario concedat vel donet' Dig. 7. 1. 12. 2. If the transfer was by gift or sale, the transferee had iure praetorio a right in rem.

§ **2.** Before Q. Mucius even the husband of a woman to whom the usus of a house was left might not live in it with her, Dig. 7. 8. 4. 1: whether the usuary's liberti might be housed was a question to the time of Celsus, Dig. ib. 2. 1. With 'aliis quibus non minus quam servis utitur' cf. Dig.

legitur, ut ipse tantum habitet, nec hoc ius ad alium transferre potest: et vix receptum videtur, ut hospitem ei recipere liceat. et cum uxore sua liberisque suis, item libertis nec non aliis liberis personis, quibus non minus quam servis utitur, habitandi ius habeat: et convenienter si ad mulierem usus aedium
3 pertineat, cum marito habitare liceat. Item is, ad quem servi usus pertinet, ipse tantum operis atque ministerio eius uti potest: ad alium vero nullo modo ius suum transferre ei con-
4 cessum est. idem scilicet iuris est et in iumento. Sed si pecoris vel ovium usus legatus fuerit, neque lacte neque agnis neque lana utetur usuarius, quia ea in fructu sunt. plane ad stercorandum agrum suum pecoribus uti potest.

5 Sed si cui habitatio legata sive aliquo modo constituta sit, neque usus videtur neque usus fructus, sed quasi proprium aliquod ius. quam habitationem habentibus propter rerum utilitatem secundum Marcelli sententiam nostra decisione promulgata permisimus non solum in ea degere, sed etiam aliis locare.

6 Haec de servitutibus et usu fructu et usu et habitatione dixisse sufficiat. de hereditate autem et de obligationibus suis locis proponamus. exposuimus summatim, quibus modis iure gentium res adquiruntur: modo videamus, quibus modis legitimo et civili iure adquiruntur.

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7. 8. 4 pr. 'quos loco servorum in operis habet, licet liberi sint vel servi alieni.'

§ 4. The ius stercorandi seems to correspond to the usus cottidianus of § 1 supr.

§ 5. It was a question among the jurists whether habitatio and operae servorum sive animalium were distinct rights from usus and usufruct: 'operis servi legatis usum datum intellegi et ego didici et Iulianus existimat' Clemens in Dig. 7. 7. 5; for the different views respecting habitatio see Ulpian in Dig. 7. 8. 10, and Cod. 33. 3. 13. Finally the distinction was admitted; the points of difference between these two rights and usus, which they most resemble, being that mentioned in the text, that they were not extinguished by non-user or capitis deminutio, Dig. 7. 8. 10 pr., and that the right to operae passed to the legatee's heir, Dig. 33. 2. 2.

For the three iura in re aliena which were not servitudes see Excursus II at the end of this Book.

§ 6. Having described the natural modes of acquiring res (corporales) singulae in Tit. 1 Justinian takes occasion, after drawing the distinction between things corporeal and incorporeal in Tit. 2, to discuss an important branch of the latter, viz. servitudes. He now returns to the civil

VI

DE USUCAPIONIBUS ET LONGI TEMPORIS POSSESSIONIBUS

Iure civili constitutum fuerat, ut, qui **bona fide** ab eo, qui G. ii. 43.
dominus non erat, **cum crediderit eum dominum esse**, rem

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modes of acquisition, which are two in number, usucapio (Tit. 6), and donatio (Tit. 7).

It has been already observed that in the Roman system civil are older than natural titles. Three of the former were obsolete before Justinian's time, or were abolished by him, viz.

(1) Addictio in the wider sense, the making over of property to individuals in the name of the people by the decree of a magistrate, especially in the form of emptio sub corona (Gell. 7. 4; 13. 24), and sectio bonorum (Gaius iv. 146). (2) In iure cessio, a voluntary transfer effected under magisterial authority through the fiction of a suit at law, as in the English fines and recoveries. It is described by Gaius ii. 24, who tells us (25) that even in his day it had been abandoned for the conveyance of corporeal single things, though this is hardly consistent with his 59th section, where he speaks of property being conveyed in this manner with a fiducia, for the purpose of mortgage or deposit. It is possible that here, as in some other passages of his book, he uses the present tense in describing practices or institutions which in fact had become obsolete. It was, however, still used in adoptions (note on Bk. i. 11. 2 supr.), transfer of tutela legitima over women (Gaius i. 168), creation of servitudes, and conveyance of the right to accept an inheritance (Gaius ii. 35–37). In Justinian's time it had altogether disappeared. (3) Mancipatio: res mancipi, viz. land and rustic servitudes in Italy, slaves, domestic beasts of burden, free persons in potestas, manus or mancipium, and under certain circumstances a man's whole property in the aggregate (familia) could be conveyed in full ownership only by this or in iure cessio; it is described by Gaius i. 119–122. Mancipation disappeared from the law of Justinian owing to his abolition of the distinction between res mancipi and nec mancipi, Cod. 7. 31.

Two other civil modes of acquisition still operative under Justinian are not here treated by him, viz.

(4) Lex, which includes legacy (Tit. 20 pr. inf.) and caduca and ereptoria; Ulpian, Reg. 19. 17.

(5) Adiudicatio, the sentence of a judge in a iudicium divisorium legitimum whereby property vests in the individual in severalty without the necessity of ordinary conveyance, Bk. iv. 17. 8 inf. If the iudicium was not legitimum, the property was praetorian only; Dig. 10. 2. 44. 1.

The next Title, on the subject of usucapio, presupposes some knowledge of the Roman law of Possession. For this see Excursus III at the end of this Book.

Tit. VI. 'Usucapio est adiectio dominii per continuationem possessionis temporis lege definiti' Dig. 41. 3. 3; it was as old as the Twelve

emerit vel ex donatione aliave qua iusta causa acceperit, is eam rem, si mobilis erat, anno ubique, si immobilis, biennio tantum in Italico solo usucapiat, **ne rerum dominia in incerto**
G. ii. 44. **essent.** et cum hoc placitum erat, putantibus antiquioribus **dominis sufficere ad inquirendas res suas** praefata tempora, nobis melior sententia resedit, ne domini maturius suis rebus

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Tables, in which it is called simply usus; see Muirhead, Roman Law, p. 145. For its operation under the classical law the following conditions were required to be satisfied:—

(1) Usucapio, being a mode of acquiring dominium ex iure Quiritium, presupposes (*a*) that the person acquiring has the commercium: by this peregrini were excluded: 'adversus hostem aeterna auctoritas' Cic. de Off. i. 12. 37; (*b*) that the thing, which is to be acquired, is not only capable of being possessed, but is in commercio. This excludes free men (Gaius ii. 48), res divini iuris (ib.), and res publicae, in particular solum provinciale (ib. 46); the last, however, could be possessed (Savigny, Poss. § 9). In addition to this, certain things were prohibited by positive enactment from being acquired in this way, especially res furtivae and vi possessae (§ 2 inf.), res mancipi of women in agnatic guardianship, unless delivered by the woman herself with the guardian's auctoritas (Gaius ii. 47); res fiscales (§ 14 inf.); property of the emperor (Cod. 7. 38), and of minors (Cod. 7. 35. 3); res dotales under certain circumstances, and immoveable property of religious and charitable corporations.

(2) The object must be 'possessed', not merely detained, during the period required by law, and

(3) The possession must have originated in a iusta causa or a iustus titulus ('usucapio, non praecedente vero titulo, procedere non potest, nec prodesse neque tenenti neque heredi eius potest' Cod. 7. 29. 4; cf. the opening section of this Title), and have been accompanied at its inception by bona fides (§§ 1 and 3 inf.): these requirements having been grafted on to the law of the Twelve Tables by the later jurisprudence. Both of these expressions need a little elucidation. By the requirement of iusta causa is meant that the possessor must have got possession in some way which would have made him owner, only that in the particular case, owing to some external defect, acquisition of possession is not equivalent to acquisition of ownership; Justinian's language in the first lines of the text is misleading, as the chief use of usucapio had before him been in cases where res mancipi were transferred by mere traditio (Gaius ii. 41), p. 197 supr. Such causae of course are numerous, the clue to them in the authorities being the word 'pro' (possidet pro soluto, pro empto, pro herede, pro donato, pro derelicto, pro legato, pro dote, etc.). By bona fides is meant a negative rather than a positive state of mind, i. e. ignorance of fact (Dig. 2. 15. 41. 4), occasioned by excusable error, as to the circumstances which prevent the acquisition of ownership ('qui ignorabat . . . alienum . . . bonae fidei possessor' Dig. 48. 15. 3 pr.); the cases in which its presence can be really a question are cases of materially defective

defraudentur neque certo loco beneficium hoc concludatur. et ideo constitutionem super hoc promulgavimus, qua cautum est, ut res quidem mobiles per triennium usucapiantur, immobiles vero per longi temporis possessionem, id est inter praesentes decennio, inter absentes viginti annis usucapiantur et his modis non solum in Italia, sed in omni terra, quae nostro

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acquisition, where the usucapio has to prevail against an actual (and not *merely* Quiritarian) owner, as e. g. if a non-owner sells and delivers property, the purchaser, besides this causa (pro empto) must not know that it belongs to some one other than the vendor, or that the vendor has no authority to sell ; 'bonae fidei emptor esse videtur, qui ignoravit eam rem alienam esse, aut putavit eum, qui vendidit, ius vendendi habere, puta procuratorem aut tutorem esse' Dig. 50. 16. 109. By Roman law bona fides was required only at the inception of possession, and in sales also at the time of the contract : under the canon and modern civil law it is different.

(4) The possession must continue uninterruptedly during the period fixed by law ; in case of interruption (usurpatio) the whole time must commence and run again. Litis contestatio did not interrupt usucapio, Dig. 6. 1. 18, though it did longi temporis praescriptio, Cod. 7. 33. 1. 2. The time required by the Twelve Tables was two years for acquisition of immoveables, one for that of moveables.

The exclusion of provincial soil from the operation of usucapio led indirectly to very considerable changes in the law. The ground upon which Justinian tells us usucapio was recognised—ne rerum dominia in incerto essent—was as real a one in the provinces as in Italy ; and in them its place was taken by an analogous institution, longi temporis praescriptio or possessio, which owed its efficacy to the edicts of the provincial governors, and whose operation was extended—probably for the benefit of peregrini—to moveables by Caracalla, Dig. 44. 3. 9. By this, if a man possessed land for ten years (or twenty, if the owner lived out of the province) Dig. 18. 1. 76. 1, the latter's action for its recovery could, after the lapse of that period, be defeated by a plea (called originally praescriptio, later exceptio) alleging the length of the defendant's possession. The rules already stated as to iusta causa and bona fides, and the positive enactments excluding certain things from this mode of acquisition (e. g. res furtivae and vi possessae) were applied here as well as in usucapio. It operated at first, as it were, as a Statute of Limitation only, but eventually it conferred ownership, the longi temporis possessor being allowed by Justinian to bring a real action for the recovery of the object if deprived of it ; see Cod. 7. 39. 8 pr., where he says 'hoc enim et veteres leges, si quis eas recte inspexerit, sanciebant' ; for this see Dig. 12. 2. 13. 1 ; Cod. 7. 33. 7.

When Justinian became emperor, the law of Prescription in his dominions consisted really of two heterogeneous portions. Res mobiles could be acquired by the old civil law usucapio in a year ; but practically all the soil of the Eastern Empire was 'provincial', so that the old biennii

imperio gubernatur, dominium rerum iusta causa possessionis praecedente adquiratur.

G. ii. 45. 1 **Sed aliquando etiamsi maxime quis bona fide rem possederit, non tamen illi usucapio** ullo tempore **procedit, veluti si quis** liberum hominem vel rem sacram vel religiosam vel servum
2 fugitivum **possideat.** Furtivae quoque res et quae vi possessae sunt, nec si praedicto longo tempore bona fide possessae fuerint, usucapi possunt: **nam furtivarum rerum lex duodecim tabularum** et lex Atinia **inhibet usucapionem, vi**

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usucapio had no application; its place was supplied by the praetorian longi temporis possessio of ten or twenty years. Justinian reformed the old law as follows: (1) he did away with the old legal distinction between Italian and provincial soil; (2) altered the periods of time required, as stated in this section, three years instead of one being now necessary for the usucapio of res mobiles; and (3) upon the analogy of Theodosius II's limitation of actions, he enacted that thirty years' possession of property, moveable or immoveable, should confer ownership, whether it admitted of the ordinary usucapio or no, and even in the absence of iustus titulus, Cod. 7. 39. 8. This was called longissimi temporis praescriptio.

§ 1. The mention of the runaway slave in this rather than in the next section ('ancilla fugitiva sui furtum facere intellegitur' Dig. 47. 2. 60; cf. Cod. 6. 1. 1) is perhaps due to the senatus-consult (Dig. 48. 15. 2) which prohibited alienation of fugitivi, and so might be said in some sense to have placed them in the category of res extra commercium.

§ 2. The relation between the enactment of the Twelve Tables and the lex Atinia (which apparently was passed about the middle of the second century B.C.) seems to have been that the latter, while repeating the prohibition of the former, added that the vitium furti should be purged as soon as the object returned to the possession of the owner, Dig. 41. 3. 4. 6; 50. 16. 215: see on § 3 inf.

The lex Iulia et Plautia of this section and of Gaius ii. 45 is in Dig. 41. 3. 33. 2 called Plautia et Iulia. Theophilus tells us that they were two distinct statutes: the one perhaps the lex Plautia de vi, mentioned by Cicero pro Mil. 13, ad Fam. viii. 8, and enacted probably B.C. 77: the other the well-known lex Iulia de vi, iv. 18. 8 inf., Dig. 48. 7. So far as concerns usucapion they related mainly to land, which did not come within the operation of the Twelve Tables and the lex Atinia, § 7 inf. It is clear from that section that if a piece of land was once 'vi possessa' not even a bona fide possessor could acquire it by usucapion, any more than he could a thing which had been stolen: but a man might be vi deiectus without his land being possessed by force: 'lex Plautia et Iulia ea demum vetuit longa possessione capi, quae vi possessa fuissent, non etiam ex quibus vi quis deiectus fuisset,' Dig. 43. 1. 33. 2.

§ 3. The vitium furti was purged, so that the thing became again capable of being acquired by usucapion, if it returned into the hands of its owner

possessarum lex Iulia et Plautia. Quod autem dictum est 3
furtivarum et vi possessarum rerum usucapionem per legem G. ii. 49.
prohibitam esse, non eo pertinet, ut ne ipse fur quive per vim possidet usucapere possit: nam his alia ratione usucapio non competit, quia scilicet mala fide possident: sed ne ullus alius, quamvis ab eis bona fide emerit vel ex alia causa acceperit,
usucapiendi ius habeat. unde in rebus mobilibus non facile G. ii. 50.
procedit, ut bonae fidei possessori usucapio competat. nam qui alienam rem vendidit vel ex alia causa tradidit, furtum
eius committit. Sed tamen id aliquando aliter se habet. nam 4
si heres rem defuncto commodatam aut locatam vel apud eum depositam existimans hereditariam esse bona fide accipienti vendiderit aut donaverit aut dotis nomine dederit, quin is qui acceperit usucapere possit, dubium non est, quippe ea res in furti vitium non ceciderit, cum utique heres, qui bona fide
tamquam suam alienaverit, furtum non committit. Item si is, 5
ad quem ancillae usus fructus pertinet, partum suum esse credens vendiderit aut donaverit, furtum non committit: fur-
tum enim sine affectu furandi non committitur. Aliis quoque 6
modis accidere potest, ut quis sine vitio furti rem alienam ad aliquem transferat et efficiat, ut a possessore usucapiatur.
Quod autem ad eas res, quae solo continentur, expeditius pro- 7
cedit, ut quis loci vacantis possessionem propter absentiam G. ii. 5
aut neglegentiam domini, aut quia sine successore decesserit,

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(§ 8 inf.; cf. Bk. iv. 1. 12) or of his agent to his knowledge. Hence if a man steals his own property (e.g. from a usufructuary or bona fide possessor) usucapion is not hindered, Dig. 47. 2. 20. 1. It is deemed to have returned to his hands as soon as he knows who has got it, and is consequently able to bring a real action for its recovery; 'in lege Atinia in potestatem domini rem furtivam venisse videri, et si eius vindicandae potestatem habuerit, Sabinus et Cassius aiunt' Dig. 50. 16. 215. It is uncertain whether the vitium was purged by the property being restored to the possession of him from whom, though not its owner, it was stolen, e.g. the bona fide possessor, usufructuary, or pledgee; Dig. 41. 3. 4. 6 distinctly says no, but 49 of the same Title contains a genuine exception.

§ 6. For other cases see Dig. 41. 8. 4, Paul. Sent. Rec. 5. 2. 5, Cod. 7. 33. 1.

§ 7. Justinian altered the law, as it is here stated, by Nov. 119. 7, by which he enacted that a bona fide possessor of land by transfer from a mala fide possessor should become owner by usucapio in ten or twenty years only if all the facts were known to the owner; otherwise thirty years' possession was required.

sine vi nanciscatur. qui **quamvis ipse** mala fide possidet, quia
intellegit se **alienum fundum** occupasse, tamen, si **alii bona**
fide accipienti tradiderit, poterit ei longa possessione res ad-
quiri, quia neque furtivum neque vi possessum accepit, **abolita**
est enim quorundam veterum sententia existimantium etiam
fundi locive furtum fieri et eorum, qui res soli possident, prin-
cipalibus constitutionibus prospicitur, ne cui longa et indubi-
8 tata possessio auferri debeat. Aliquando etiam furtiva vel vi
possessa res usucapi potest: veluti si in domini potestatem
reversa fuerit. tunc enim vitio rei purgato procedit eius usu-
9 capio. Res fisci nostri usucapi non potest. sed Papinianus
scribit bonis vacantibus fisco nondum nuntiatis bona fide em-
ptorem sibi traditam rem ex his bonis usucapere posse: et ita
10 divus Pius et divus Severus et Antoninus rescripserunt. No-
vissime sciendum est rem talem esse debere, ut in se non
habeat vitium, ut a bona fide emptore usucapi possit vel qui
ex alia iusta causa possidet.

11 Error autem falsae causae usucapionem non parit. veluti si quis, cum non emerit, emisse se existimans possideat: vel cum ei donatum non fuerat, quasi ex donatione possideat.

12 Diutina possessio, quae prodesse coeperat defuncto, et heredi et bonorum possessori continuatur, licet ipse sciat prae-

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§ 9. Bona vacantia is property of a deceased person who leaves no successor, civil or praetorian, Dig. 49. 14. 1. 2; 44. 3. 10. 1; Cod. 10. 10.

§ 10. Apparently a general statement of the rule which §§ 1–9 are intended to exemplify.

§ 11. The commentators use the phrase titulus putativus for cases of this sort. Justinian's statement of the law must be taken subject to the exception that a titulus putativus will support usucapio where the error is of fact and excusable, Dig. 41. 10. 5; 41. 4. 11. Conversely, usucapio will operate where there is a iusta causa unknown to the possessor, Dig. ib. 2. 2. The rule has no application when there is a mere mistake in the causa, as where the transferor means to give, and the transferee to buy, Dig. 41. 3. 31. 6, ib. 44. 4; see Tit. 20. 30 inf., and cf. note on Tit. 1. 40 supr. ad fin.

§ 12. Accessio temporis or possessionis, the reckoning together, as one possession, the otherwise unbroken possession of a man and his successor in title for purposes of usucapio, had been allowed very early, if not always, between a deceased person and his heirs, on the ground of their fictitious identity, which was so consistently realised that (as is remarked in the text) if the deceased was in condicione usucapiendi, no mala fides on the part of the heir on succeeding vitiated the possession.

dium alienum: quodsi ille initium iustum non habuit, heredi et bonorum possessori licet ignoranti possessio non prodest. quod nostra constitutio similiter et in usucapionibus observari constituit, ut tempora continuentur. Inter venditorem quoque 13
et emptorem coniungi tempora divus Severus et Antoninus rescripserunt.

Edicto divi Marci cavetur eum, qui a fisco rem alienam 14
emit, si post venditionem quinquennium praeterierit, posse dominum rei per exceptionem repellere. constitutio autem divae memoriae Zenonis bene prospexit his, qui a fisco per venditionem vel donationem vel alium titulum aliquid accipiunt, ut ipsi quidem securi statim fiant et victores existant, sive conveniantur sive experiantur: adversus sacratissimum autem aerarium usque ad quadriennium liceat intendere his, qui pro dominio vel hypotheca earum rerum, quae alienatae sunt, putaverint sibi quasdam competere actiones. nostra autem divina constitutio, quam nuper promulgavimus, etiam de his, qui a nostra vel venerabilis Augustae domo aliquid acceperint, haec statuit, quae in fiscalibus alienationibus praefata Zenoniana constitutione continentur.

Under the contrary supposition, not only could the heir not reckon the deceased's possession, but could not acquire by usucapio even if his own possession had commenced bona fide, Dig. 44. 3. 11, and though the heir's alienee in § 4 supr. could acquire in this manner, he could not do so himself. The same principles were applied to the bonorum possessor, but not the legatee. By usucapionibus at the end of the section is meant Justinian's new system of usucapio.

§ 13. In the case of singular as distinct from universal succession accessio possessionis does not seem to have been allowed in the old civil law usucapio except between vendor and vendee, and that not until the rescript mentioned in the text. In the corresponding praetorian system (longi temporis possessio) it was permitted if the justice of the particular case seemed to require it: 'de accessionibus possessionum nihil in perpetuum neque generaliter definire possumus, consistunt enim in sola aequitate' Dig. 44. 3. 14 pr. Under Justinian it was allowed in all cases between the usucapion possessor and his predecessor in title (Dig. 41. 4. 2. 17 and 20; 44. 3. 15. 1–6, Cod. 7. 31) provided there had been no break, vacuum tempus, Dig. 44. 3. 15. 1.

§ 14. For Zeno's constitution see Cod. 7. 37. 2. Under the older law there had been three abnormal cases of usucapio, in which the ordinary rules were suspended in respect either of bona fides, titulus, or length of the possession, viz. usucapio lucrativa or possessio pro herede, practically abolished by a senatus-consult of Hadrian's time (SC. Iuventianum),

VII

DE DONATIONIBUS

Est etiam aliud genus adquisitionis donatio. donationum autem duo genera sunt: mortis causa et non mortis causa.
1 Mortis causa donatio est, quae propter mortis fit suspicionem, cum quis ita donat, ut, si quid humanitus ei contigisset, haberet is qui accepit: sin autem supervixisset qui donavit, reciperet, vel si eum donationis poenituisset aut prior decesserit is cui donatum sit. hae mortis causa donationes ad exemplum legatorum redactae sunt per omnia. nam cum prudentibus ambiguum fuerat, utrum donationis an legati instar eam optinere oporteret, et utriusque causae quaedam habebat insignia et alii ad aliud genus eam retrahebant: a

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Gaius ii. 52-58; usureceptio lucrativa, ib. 59; and usureceptio ex praediatura, ib. 60. 61. These were survivals of the original law, which seems to have required neither bona fides nor iusta causa in any case of usucapio: see Girard, 4th ed., p. 303, note 1.

Tit. VII. Donatio was perhaps treated by the older jurists as a distinct mode of acquisition because, under the law of the lex Cincia (for which see inf.), as a rule 'sola promissio non perficit donationem, sed exigitur, ut . . . et interdicto superior sit is, cui [donatum est]' Fragm. Vat. 311: and to succeed in the interdict it was necessary that the donee should have a possession which would suffice to make him dominus either Quiritarian or bonitarian. They regarded it as a civilis adquisitio probably because res mancipi could be given only by mancipatio, Fragm. Vat. 263, 4. Justinian's treatment of it as a civil mode of acquisition is indefensible: it is not gift alone, as Savigny remarks, which confers dominium in any case, but gift in combination with and serving as a iusta causa (p. 210 supr.) for traditio, exactly as sale or exchange might serve. Again, it is not necessary that donatio should take the form of conferring dominium: it may consist in the constitution of a ius in re aliena, the transfer of possession, the giving of an actionable promise, or the release of a debt.

Donatio in the widest sense is any other than a testamentary disposition, which (1) is accompanied by consensus between the two parties: (2) voluntarily, gratuitously, and intentionally improves the proprietary position of the donee; and (3) actually or prospectively diminishes the property of the donor. Provided these conditions are satisfied, it may take any of the forms above mentioned.

§ 1. A donatio mortis causa stands midway between a legacy and a gift inter vivos. In that it consists in a present act of bounty ('praesens praesenti dat' Dig. 39. 6. 38) it differs from the former, which confers no right whatever on the legatee until the testator is dead and his heir has accepted the inheritance: here, if the donee outlives the donor, the thing given never goes to the heir at all. It differs from the latter in being

nobis constitutum est, ut per omnia fere legatis connumeretur et sic procedat, quemadmodum eam nostra formavit constitutio. et in summa mortis causa donatio est, cum magis se quis velit habere, quam eum cui donatur, magisque eum cui donat, quam heredem suum. sic et apud Homerum Telemachus donat Piraeo.

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absolutely perfected only by the donor's decease. The gift may be made so conditional on that event, that the property in the gift does not pass to the donee until its occurrence; in the meanwhile he has only its use and enjoyment: or the property may pass at once, subject to the understanding that it is to revert to the donor in case of his proving the better life. Where the gift is made in anticipation of some especial danger threatening him, it is cancelled not only by the donee's prior decease, but also so soon as that danger is survived. In any case the donor may revoke the gift at any moment prior to his decease ('cum quis ita donat ut . . . reciperet si eum donationis poenituisset'). Justinian's later statement, that in nearly all respects donationes mortis causa were governed by the same rules as legacies, is truer than his earlier one, that the parallelism was complete. Thus (1) donatio m. c. was quite independent of the fate of the inheritance: legacy depended on acceptance of the hereditas. (2) It is not clear whether any particular qualification in the way of commercium was required in either donor or donee, though Paulus says in Dig. 39. 6. 35 pr. that the leges caducariae were made to apply to them by a senatus-consult, whereas the validity of a legacy presupposed testamenti factio in both parties: similarly a filiusfamilias could with his pater's consent make gifts mortis causa from his peculium profectitium, but in no case could he bequeath it. (3) Legacies were avoided by the successful bringing of a querella inofficiosi (Tit. 18 inf.), but gifts m. c. were not so affected: 'qui mortis causa donationem accepit a testatore, non est similis in hac causa legatario' Dig. 34. 9. 5. 17. But among the points of resemblance are the following: (1) The rules of the leges Furia and Voconia, Tit. 22 pr. inf. applied to both, Gaius ii. 225, 6; iv. 23. (2) The provisions of the leges Iulia and Papia Poppaea (note on Tit. 14 pr. inf.) as to capacity to take legacies was extended to gifts m. c. by a senatus-consult, Dig. 39. 6. 35 pr. (3) By a constitution of Septimius Severus the heir was entitled to deduct the Falcidian fourth (Tit. 22 inf.) from such gifts, Cod. 8. 57. 2. 2; 6. 50. 5. (4) If the donor became insolvent the creditors might impeach his gifts mortis causa: 'nam cum legata ex testamento eius, qui solvendo non fuit, omnimodo inutilia sunt, possunt videri etiam donationes mortis causa factae rescindi debere, quia legatorum instar obtinent' Dig. 39. 6. 17. (5) Gifts m. c., like legacies, became void if the donor underwent capital punishment, Dig. ib. 7.

No particular form was prescribed for this class of gift unless its amount exceeded 500 solidi, in which case it must either be registered (insinuatio in acta) or made before five witnesses of the same qualification as was required in the execution of codicilli (note on Tit. 25. 3 inf.), Cod. 8. 57. 4.

2 Aliae autem donationes sunt, quae sine ulla mortis cogitatione fiunt, quas inter vivos appellamus. quae omnino non comparantur legatis: quae si fuerint perfectae, temere revo-

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Most editions of the Institutes insert at the end of this section some lines from Odyssey 17. 78–83. They are not found, however, in the great majority of the MSS., or in the passage of Marcianus in Dig. 39. 6. 1 from which our text is obviously derived.

§ 2. When the gift takes the form of a promise, the latter, and not its performance, is the gift, for performance can be enforced by action, and 'donari videtur quod nullo iure cogente conceditur' Dig. 50. 17. 82. Such promises originally were not actionable unless made by stipulatio: Antoninus Pius made a mere formless promise actionable between parents and children (Fragm. Vat. 314); and, as appears from this section, Justinian extended this to all persons whatsoever: 'non ex hoc inutilis sit donatio, quod res non traditae sunt, nec confirmetur ex traditione donatio' Cod. 8. 54. 35. 5.

Gifts inter vivos were not as a rule revocable, like those made mortis causa. By the old law, the pater or patronus might revoke gifts to an emancipated child or libertus during their joint lives (Fragm. Vat. 272), but this right was limited by Diocletian and succeeding emperors to cases in which ingratitude could be proved, or where children were subsequently born to the donor. Justinian, as he here says, while permitting all donors without distinction to revoke on the first of these grounds, carefully specified the acts which amounted to legal ingratitude, Cod. 8. 56. 10.

Gifts between husband and wife were void by customary law, 'ne mutuo amore invicem spoliarentur' Dig. 24. 1. 1, ib. 3. 10. Allusion is also made in this section to the invalidity of gifts exceeding a certain maximum unless made under prescribed forms. The oldest enactment on this subject is the lex Cincia de muneribus, B.C. 204, from the operation of which, however, certain classes of persons were excepted on the ground of kinship, affinity, patronatus, or the donor's being the donee's guardian. It appears to have enacted that, as between personae non exceptae, gifts should be imperfect and revocable in whole or part either if they exceeded a certain maximum, the amount of which is unknown, or unless both ownership and possession of the thing given were conveyed in the appropriate manner (mancipatio and traditio), Fragm. Vat. 310-313. Being a lex imperfecta, it did not avoid a gift which failed to satisfy both of these conditions, or impose a penalty on the donee: but the introduction of the exceptio legis Cinciae practically enabled donors to revoke gifts which violated the statute at any moment prior to their decease ('morte Cincia removetur' Fragm. Vat. 259. 266). If one may argue from the analogy of the lex Furia testamentaria (Tit. 22 pr. inf.), the maximum fixed by the lex Cincia was one which two hundred years afterwards must have seemed ridiculously small: it is not improbable that after some while observation of the statutory requirement as to form (con-

cari non possunt. perficiuntur autem, cum donator suam voluntatem scriptis aut sine scriptis manifestaverit: et ad exemplum venditionis nostra constitutio eas etiam in se habere necessitatem traditionis voluit, ut, et si non tradantur, habeant plenissimum et perfectum robur et traditionis necessitas incumbat donatori. et cum retro principum dispositiones insinuari eas actis intervenientibus volebant, si maiores ducentorum fuerant solidorum, nostra constitutio et quantitatem usque ad quingentos solidos ampliavit, quam stare et sine insinuatione statuit, et quasdam donationes invenit, quae penitus insinuationem fieri minime desiderant, sed in se plenissimam habent firmitatem. alia insuper multa ad uberiorem exitum donationum invenimus, quae omnia ex nostris constitutionibus, quas super his posuimus, colligenda sunt. sciendum tamen est, quod, etsi plenissimae sint donationes, tamen si ingrati existant homines, in quos beneficium collatum est, donatoribus per nostram constitutionem licentiam praestavimus certis ex causis eas revocare, ne, qui suas res in alios contulerunt, ab his quandam patiantur iniuriam vel iacturam, secundum enumeratos in nostra constitutione modos. Est et 3

veyance) was allowed to atone for violation of the rule as to amount, so that the latter became tacitly repealed by disuse: the rareness of passages referring to the maximum seems to require some such hypothesis.

To facilitate proof, it appears to have become common under the empire to register gifts apud acta (Fragm. Vat. 266 a, 268). Such registration was made compulsory for all gifts exceeding 200 solidi in value, except those to personae exceptae lege Cincia, by Constantius Chlorus: of this privilege even they were deprived by Constantine, Cod. Theod. 8. 12. 3. 5, as later still they were of the other advantage they had enjoyed under the old statute, viz. that gifts between them did not require conveyance for their perfection (Cod. Theod. 8. 12. 5), which was allowed to survive in favour only of parents and children. Justinian, as he says here, enacted that delivery should in no case be essential for the perfection of the gift, and relieved gifts of more than 200 but not exceeding 500 solidi from the necessity of registration: where one exceeding that amount was unregistered, the excess could not be claimed. The gifts to which he refers as not requiring registration however large are gifts to and from the emperor, those forming a dos so far as they can be construed as gifts to the wife, and such as were made for the redemption of captives and the rebuilding of houses fallen or otherwise destroyed, Cod. 8. 54. 34; 5. 12. 31.

§ 3. The donatio ante or propter nuptias was gradually developed out of the arrha or sponsalicia largitas, and its object, like that of the dos, was

aliud genus inter vivos donationum, quod veteribus quidem prudentibus penitus erat incognitum, postea autem a iunioribus divis principibus introductum est, quod ante nuptias vocabatur et tacitam in se condicionem habebat, ut tunc ratum esset, cum matrimonium fuerit insecutum: ideoque ante nuptias appellabatur, quod ante matrimonium efficiebatur et nusquam post nuptias celebratas talis donatio procedebat. sed primus quidem divus Iustinus pater noster, cum augeri dotes et post nuptias fuerat permissum, si quid tale evenit, etiam ante nuptias donationem augeri et constante matrimonio sua constitutione permisit; sed tamen nomen inconveniens remanebat, cum ante nuptias quidem vocabatur, post nuptias autem tale accipiebat incrementum. sed nos plenissimo fini tradere sanctiones cupientes et consequentia nomina rebus esse studentes constituimus, ut tales donationes non augeantur tantum, sed et constante matrimonio initium accipiant et non ante nuptias, sed propter nuptias vocentur et dotibus in hoc exaequentur, ut, quemadmodum dotes et constante matrimonio non solum augentur, sed etiam fiunt, ita et istae donationes, quae propter nuptias introductae sunt, non solum antecedant matrimonium, sed etiam eo contracto et augeantur et constituantur.

4 Erat olim et alius modus civilis adquisitionis per ius ad-

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to support the expenses of the joint household: hence the extension to it of nearly all the rules relating to the former, and the name ἀντίφερνα (antidos) given to it in Cod. 5. 3. 20. 2. There are no constitutions bearing upon it earlier than Theodosius II. The woman had a legal claim against the husband's paterfamilias to a donatio propter nuptias, Cod. 5. 11. 2, and by Nov. 97. 1 and 2 Justinian enacted that the donatio should be equivalent in amount to the dos which the wife brought with her. During the continuance of the marriage it was under the control of the husband, and in fact belonged to him, but he could not alienate land or houses comprised in it even with the consent of the wife, who had by Justinian's law a statutory hypothec over all his property to secure its delivery should she become entitled. In case of her death, or divorce through her fault, it ceased to have any further legal existence; if the marriage terminated through the husband's death or divorce occasioned by him, she had no claim upon it, unless there was issue, save by express agreement; if there was issue, she was entitled to the usufruct; the dominium she shared with the children. If the husband became insolvent, or even embarrassed, she could demand it at once, Cod. 5. 12. 29.

§ 4. For this ius adcrescendi cf. Ulpian, Reg. 1. 18, Paul. Sent. Rec. 4.

crescendi, quod est tale: si communem servum habens aliquis cum Titio solus libertatem ei imposuit vel vindicta vel testamento, eo casu pars eius amittebatur et socio adcrescebat. sed cum pessimo fuerat exemplo et libertate servum defraudari et ex ea humanioribus quidem dominis damnum inferri, severioribus autem lucrum adcrescere: hoc quasi invidiae plenum pio remedio per nostram constitutionem mederi necessarium duximus et invenimus viam, per quam et manumissor et socius eius et qui libertatem accepit nostro fruantur beneficio, libertate cum effectu procedente (cuius favore et antiquos legislatores multa et contra communes regulas statuisse manifestissimum est) et eo qui eam imposuit suae liberalitatis stabilitate gaudente et socio indemni conservato pretiumque servi secundum partem dominii, quod nos definivimus, accipiente.

VIII

QUIBUS ALIENARE LICET VEL NON

Accidit aliquando, ut qui dominus sit alienare non possit G. ii. 62. **et** contra, **qui dominus non sit alienandae rei potestatem habeat. nam dotale praedium maritus invita muliere per legem Iuliam prohibetur alienare, quamvis ipsius sit dotis causa ei datum.** quod nos legem Iuliam corrigentes in

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12. 1, and for Justinian's change Cod. 7. 7. With 'cuius favore et antiquos legislatores', etc. cf. Dig. 40. 5. 24. 10 'multa contra iuris rigorem pro libertate sunt constituta', 35. 2. 32. 5 'favor libertatis . . . saepe benigniores sententias exprimit'. By legislatores seems to be meant the jurists.

Tit. VIII. For the anomalies mentioned here cf. Seneca, Benef. 7. 12 'non est argumento, ideo aliquid tuum non esse, quia vendere non potes', Dig. 41. 1. 46 'non est novum, ut, qui dominium non habeat, alii dominium praebeat', Cic. pro Balbo 13 'fundamenta firmissima nostrae libertatis, sui quemque iuris et retinendi et dimittendi esse dominum', Tit. 1. 40 supr. and Dig. 50. 17. 54 'nemo plus iuris in alium transferre potest, quam ipse haberet'.

The lex Iulia was that of Augustus, de adulteriis, Paul. Sent. Rec. 2. 21 b. 2. In the time of Gaius (ii. 63) it had been doubted whether it applied to praedia provincialia. For the nature of the husband's property in the dos see note p. 132 supr.

Besides the cases mentioned in the text, alienation was prohibited (1) of res litigiosa, property which was the subject of a real action or iudicium divisorium, Nov. 112. 1; (2) of immoveable property forming part of a donatio propter nuptias or belonging to religious or charitable foundations; (3) of peculium adventitium without the consent of the paterfamilias. The effect of an alienation forbidden by law is nil.

meliorem statum deduximus. cum enim lex in soli tantummodo rebus locum habebat, quae Italicae fuerant, et alienationes inhibebat quae invita muliere fiebant, hypothecas autem earum etiam volente: utrisque remedium imposuimus, ut etiam in eas res, quae in provinciali solo positae sunt, interdicta fiat alienatio vel obligatio et neutrum eorum neque consentientibus mulieribus procedat, ne sexus muliebris fragilitas in perniciem substantiae earum converteretur.

G. ii. 64. **1** Contra autem **creditor pignus ex pactione, quamvis eius ea res non sit, alienare potest. sed hoc forsitan ideo videtur fieri, quod voluntate debitoris intellegitur pignus alienare, qui** ab initio contractus **pactus est, ut liceret creditori pignus vendere, si pecunia non solvatur.** sed ne creditores ius suum persequi impedirentur neque debitores temere suarum rerum dominium amittere videantur, nostra constitutione consultum est et certus modus impositus est, per quem pignorum distractio possit procedere, cuius tenore utrique parti creditorum et debitorum satis abundeque provisum est.

G. ii. 80. **2** **Nunc admonendi sumus neque pupillum** neque pupillam ullam **rem sine tutoris auctoritate alienare posse.** G. ii. 82. **ideoque si mutuam pecuniam alicui sine tutoris auctoritate dederit, non contrahit obligationem, quia** pecuniam **non facit accipientis.** ideoque **vindicare nummos possunt, sicubi extent:** sed si nummi, quos mutuos dedit, ab eo qui accepit bona fide consumpti sunt, condici possunt, si mala fide, ad exhibendum de his agi potest. G. ii. 83. **at ex contrario omnes res pupillo et pupillae sine tutoris auctoritate** recte dari **possunt.** G. ii. 84. **ideoque si debitor pupillo solvat,** necessaria est **tutoris auctoritas:** alioquin **non liberabitur.** sed etiam hoc evidentissima ratione statutum est in constitutione, quam ad Caesareenses advocatos ex suggestione Triboniani viri eminentissimi quaestoris sacri palatii nostri promulgavimus, qua dispositum est ita licere tutori vel curatori debitorem pupil-

§ 1. For the power of sale in a pignus and for Justinian's own regulations thereon see Excursus II. inf. 'Ab initio contractus' represents 'olim' in the corresponding passage of Gaius (ii. 64), who seems to be referring to the time when a power of sale was not inherent in a pignus: see Javolenus in Dig. 47. 2. 73.

§ 2. For the necessity of the guardian's auctoritas in certain classes of dispositions see on Bk. i. 21 pr. supr.: for condictio v. General Index:

larem solvere, ut prius sententia iudicialis sine omni damno celebrata hoc permittat. quo subsecuto, si et iudex pronuntiaverit et debitor solverit, sequitur huiusmodi solutionem plenissima securitas. sin autem aliter quam disposuimus solutio facta fuerit et pecuniam salvam habeat pupillus aut **ex ea locupletior sit et adhuc** eandem summam pecuniae **petat,** G. ii. 84.
per exceptionem doli mali summoveri poterit : quodsi aut male consumpserit aut furto amiserit, nihil proderit debitori doli mali exceptio, sed nihilo minus damnabitur, quia temere sine tutoris auctoritate et non secundum nostram dispositionem solverit. sed ex diverso pupilli vel pupillae solvere sine tutore auctore non possunt, quia id quod solvunt non fit accipientis, **cum** scilicet **nullius rei alienatio eis sine tutoris auctoritate concessa est.**

IX

PER QUAS PERSONAS NOBIS ADQUIRITUR

Adquiritur nobis non solum per nosmet ipsos, sed etiam G. ii. 86.
per eos quos in potestate habemus : item per eos servos, in quibus usum fructum habemus : item per homines liberos et servos alienos quos bona fide possidemus. de quibus singulis diligentius dispiciamus. Igitur liberi vestri utriusque sexus, 1
quos in potestate habetis, olim quidem, quidquid ad eos G. ii. 87.

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for the actio ad exhibendum, Bk. iv. 6. 31 inf. The enactment to which Justinian refers, requiring a judicial order before payment could safely be made to a guardian, is in Cod. 5. 37. 25.

Tit. IX. The problem of agency in the acquisition of ownership and possession, upon which there is a good deal in this Title, may be stated thus :—Will delivery of possession, or conveyance of ownership, to B, acting as agent for A, make A possessor or owner without more, or is it necessary that there shall be a second conveyance from B to A ? This question the old law answered in the negative : it tolerated only one necessary exception. Some persons, viz. slaves, filiifamilias, and those in manu or mancipio, could not hold property owing to their subjection to a superior : if ownership or possession (as to the latter there was a doubt in respect of those in manu or mancipio, Gaius ii. 90) was transferred to them, the conveyance, unless it was to be nugatory, must enure solely to the benefit of the superior : they served solely as conduit-pipes through whom rights passed instantaneously to the latter, Gaius ii. 86–88. Other gradual modifications of the strict old rule are noticed in the text and following notes.

§§ 1, 2. The first inroad upon the proprietary incapacity of the filius-

pervenerat (exceptis videlicet castrensibus peculiis), hoc parentibus suis adquirebant sine ulla distinctione: et hoc ita parentum fiebat, ut esset eis licentia, quod per unum vel unam eorum adquisitum est, alii vel extraneo donare vel vendere vel quocumque modo voluerant applicare. quod nobis inhumanum visum est et generali constitutione emissa et liberis pepercimus et patribus debitum reservavimus. sancitum etenim a nobis est, ut, si quid ex re patris ei obveniat, hoc secundum antiquam observationem totum parenti adquirat (quae enim invidia est, quod ex patris occasione profectum est, hoc ad eum reverti?): quod autem ex alia causa sibi filius familias adquisivit, huius usum fructum quidem patri adquiret, dominium autem apud eum remaneat, ne, quod ei suis laboribus vel prospera fortuna accessit, hoc in alium perveniens
2 luctuosum ei procedat. Hocque a nobis dispositum est et in ea specie, ubi parens emancipando liberum ex rebus quae adquisitionem effugiunt sibi partem tertiam retinere si voluerat licentiam ex anterioribus constitutionibus habebat quasi pro

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familias was made about the time of Augustus, in favour of the military profession, it being enacted that of whatever a son in power acquired as soldier, e. g. outfit, pay, booty, gifts, legacies, etc. from comrades, etc., he should be absolute owner, under the name of peculium castrense, with full powers of disposition inter vivos, Dig. 49. 17. 11: 'filiifamilias in castrensi peculio vice patrumfamiliarum funguntur,' Dig. 14. 6. 2: cf. Dig. 4. 4. 3. 10: 49. 17. 15. 3: cf. ii. 12 pr. inf.: his right of disposing of it by will while on service apparently existed from the first, and Hadrian allowed him to will it away even after his discharge, Tit. 12 pr. inf.: if he died without disposing of it in the latter way, it went to the pater, iure communi, as peculium. No further changes were made for about three hundred years; but under Constantine the earnings of a filiusfamilias in certain offices of the public service were made entirely his own (peculium quasi-castrense) except that as a rule he could not dispose of them by will (Tit. 11. 6 inf.), a privilege first conferred by Justinian; and the term was gradually made to include all official, public, and ecclesiastical salaries, fees earned by advocates, and gifts from the emperor. Under Justinian the succession to peculium castrense or quasi-castrense, if the owner died intestate, was governed by the ordinary rules: the pater could succeed only as heres, not iure peculii, and was postponed to certain other relations of the deceased. By another enactment of Constantine bona materna, property descending to a child in power from his or her mother, were in future to belong to the child, the pater, however, having the administration and usufruct during his lifetime. This, which is commonly called peculium adventitium (in contradistinction to peculium

pretio quodammodo emancipationis et inhumanum quid accidebat, ut filius rerum suarum ex hac emancipatione dominio pro parte defraudetur et, quod honoris ei ex emancipatione additum est, quod sui iuris effectus est, hoc per rerum deminutionem decrescat. ideoque statuimus, ut parens pro tertia bonorum parte dominii, quam retinere poterat, dimidiam non dominii rerum, sed usus fructus retineat: ita etenim et res intactae apud filium remanebunt et pater ampliore summa fruetur pro tertia dimidia potiturus. Item vobis adquiritur, 3
quod servi vestri ex traditione nanciscuntur sive quid stipulentur vel ex qualibet alia causa adquirunt. G. ii. 87. hoc enim vobis et ignorantibus et invitis obvenit. **ipse enim** servus **qui in potestate** alterius **est nihil suum habere potest.** sed **si heres institutus sit, non alias nisi iussu vestro hereditatem adire potest: et si iubentibus vobis adierit, vobis hereditas adquiritur, perinde ac si vos ipsi heredes instituti essetis. et convenienter scilicet legatum per eos vobis adquiritur. non solum** G. ii. 89. **autem proprietas per eos quos in potestate habetis adquiritur**

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profectitium, property of his own which the pater allowed the child to enjoy without prejudicing his right to resume it at any moment), was extended by the emperors between Gratian and Honorius so as to include all bona materni generis, property coming to the child from the mother or maternal ancestors by any title whatever: Theodosius II added lucra nuptialia (dos and donatio propter nuptias), and reformed the rules as to the intestate succession to peculium adventitium by preferring the child's own issue to the pater, who by Leo and Anthemius was postponed also to brothers and sisters. Justinian, as he says in § 1, included under peculium adventitium (which in the text is called 'res quae adquisitionem effugiunt') all that the child acquired otherwise than ex re patris or in the way of peculium castrense or quasi-castrense: under his legislation consequently a child might have rights over property of three kinds, over one of which he had the absolute control; one over which his pater had a usufruct, while he was its dominus; and lastly peculium profectitium, property of the pater which the latter could resume at will, and of which he himself had only the use and enjoyment. If he were emancipated, the father originally was entitled absolutely to one-third of the peculium adventitium, 'quasi pro pretio emancipationis:' the change which Justinian made in this matter is mentioned in § 2; the peculium profectitium in such a case belonged to the son in the classical period, unless expressly resumed by the father, fragm. Vat. 260.

§ 3. For the institution of servus alienus as heres see Tit. 14. 1, 2, Tit. 19. 4 inf.: for the stipulations of slaves, Bk. iii. 17 inf.: for acquisition of possession through one's own slave, p. 239 supr. Possession could not be

vobis, sed etiam possessio: cuiuscumque enim rei possessionem adepti fuerint, id vos possidere videmini. unde etiam per eos
4 usucapio vel longi temporis possessio vobis accedit. De his
G. ii. 91. autem servis, in quibus tantum usum fructum habetis, ita placuit, ut, quidquid ex re vestra vel ex operibus suis adquirant, id vobis adiciatur, quod vero extra eas causas persecuti sunt, id ad dominum proprietatis pertineat. itaque si is servus heres institutus sit legatumve quid ei aut donatum fuerit, non
G. ii. 92. usufructuario, sed domino proprietatis adquiritur. idem placet et de eo, qui a vobis bona fide possidetur, sive is liber sit sive alienus servus: quod enim placuit de usufructuario, idem placet et de bonae fidei possessore. itaque quod extra duas istas causas adquiritur, id vel ad ipsum pertinet, si liber est,
G. ii. 93. vel ad dominum, si servus est. sed bonae fidei possessor cum usuceperit servum, quia eo modo dominus fit, ex omnibus causis per eum sibi adquirere potest: fructuarius vero usucapere non potest, primum quia non possidet, sed habet ius utendi
G. ii. 94. fruendi, deinde quia scit servum alienum esse. non solum autem proprietas per eos servos, in quibus usum fructum habetis, vel quos bona fide possidetis, vel per liberam personam, quae bona fide vobis servit, adquiritur vobis, sed etiam possessio: loquimur autem in utriusque persona secundum definitionem, quam proxime exposuimus, id est si quam possessionem ex re vestra vel ex operibus suis adepti fuerint.
G. ii. 95. 5 Ex his itaque apparet per liberos homines, quos neque iuri

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thus acquired unless the slave was himself possessed by the dominus, Dig. 41. 1. 21 pr., e.g. if he was in pledge, Dig. 41. 2. 1. 15.

§ 4. A free man bona fide possessed, though he could own, could not possess, for the latter presupposes a condition in which free actions are possible, Savigny, Poss. § 9.

In Gaius (ii. 94) it is stated as a question whether one can acquire possession through a slave in whom one has a usufruct; but it had been settled in the affirmative by the time of Papinian, on the ground that though one does not possess him, one does not possess a filiusfamilias either, Paulus in Dig. 41. 2. 1. 8: presumably the doubt expressed in Gaius ii. 90 was settled in the same manner. But the limits within which he could acquire possession for the person who had the usufruct are fixed, precisely as they are here, by Papinian in Dig. 41. 2. 49 pr., who explains Gaius' difficulty by remarking that the usufructuary at any rate has detention of the slave, and detention 'borrows much from the law'.

§ 5. A person who was not in our potestas, manus, or mancipium,

vestro subiectos habetis neque bona fide possidetis, item per alienos servos, in quibus neque usum fructum habetis neque iustam possessionem, nulla ex causa vobis adquiri posse. et hoc est quod dicitur, per extraneam personam nihil adquiri posse : excepto eo, quod per liberam personam veluti per procuratorem placet non solum scientibus, sed etiam ignorantibus vobis adquiri possessionem secundum divi Severi constitutionem et per hanc possessionem etiam dominium, si dominus fuit qui tradidit, vel usucapionem aut longi temporis praescriptionem, si dominus non sit.

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or bona fide possessed by, or a slave in usufruct to, us, was called an extranea persona : and the earlier Roman law, so far from allowing a man to acquire ownership through such an outsider to him, would not hear of his so acquiring even possession, the old maxim being 'per extraneam personam nihil adquiri potest'. Such extraneae personae had always been able to retain for a man a possession which he had validly got for himself ; and it would seem that soon after the establishment of the empire (Dig. 41. 2. 51) it was attempted by an extension of the principle to break down the old rule as to the original acquisition of possession, and thus to get over the necessity of a double traditio. Labeo seems by implication (Dig. loc. cit.) to have favoured the proposed innovation, which was also approved by Javolenus. Neratius, writing under Trajan, says 'per procuratorem possessionem adipisci nos *iam fere convenit*' Dig. 41. 3. 41 : Gaius (ii. 95) refers to the controversy as still unsettled : but Paulus (Sent. Rec. 5. 2. 2), Ulpian (Dig. 41. 1. 20. 2), and Modestinus (ib. 53), assert the new doctrine as though in their day it was completely and universally recognised. Thus the constitution of Severus (Cod. 7. 32. 1) alluded to in the text did not make new law, but was merely a statutory confirmation of a principle already sufficiently established by juristic consensus, as indeed its terms themselves allow. Its importance was that, in respect of all objects in which ownership could be transferred by mere traditio, even ownership could be acquired for one by an extranea persona : 'ea quae civiliter adquiruntur per eos, qui in potestate nostra sunt, adquirimus, veluti stipulationem (mancipationem ?) ; quod naturaliter adquiritur, sicuti est possessio, per quemlibet volentibus nobis possidere adquirimus' (Modestinus in Dig. 41. 1. 53) : 'placet per liberam personam omnium rerum possessionem quaeri posse et per hanc dominium,' Ulpian in Dig. 41. 1. 20. 2. When, as under Justinian, traditio was the universal mode of transferring dominium in res corporales, delivery of possession to one's agent, if the transferor was owner, was delivery of ownership, if intended, to oneself : if he was not, all that one got was possession, which, however, usucapio could convert into ownership : but usucapio did not begin to run until the acquisition of possession by the agent was made known to the principal, Cod. 7. 32. 1.

G. ii. 97. 6 **Hactenus tantisper admonuisse sufficiat, quemadmodum singulae res adquiruntur: nam legatorum ius, quo et ipso singulae res vobis adquiruntur,** item fideicommissorum, ubi singulae res vobis relinquuntur, **opportunius** inferiori **loco referemus. videamus itaque nunc, quibus modis per universi-**
G. ii. 98. **tatem res vobis adquiruntur. si cui** ergo **heredes facti sitis sive cuius bonorum possessionem petieritis** vel **si quem** adrogaveritis vel si cuius bona libertatum conservandarum causa vobis addicta fuerint, **eius res** omnes **ad vos transeunt. ac prius de**
G. ii. 99. **hereditatibus dispiciamus. quarum duplex condicio est: nam vel ex testamento vel ab intestato ad vos pertinent. et prius est,**

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§ 6. Justinian now proceeds to discuss universal successions, or the modes in which a man's entire proprietary relations—his property and his rights and liabilities, so far as they are not purely personal—pass uno ictu to another, or others viewed collectively. Four such modes are here enumerated, but far the most important of them are hereditas and bonorum possessio, which are treated together and practically form a single institution. Their problem is this:—When a man dies, what becomes of his property, and who, if any one, becomes answerable for his liabilities?

According to the Roman view, as soon as a man died his proprietary relations assumed a separate, independent, and collective existence: his universitas iuris became specifically an hereditas, belonging, in many cases, as yet to no one, and as it were perpetuating the existence of the deceased: 'res hereditariae, antequam aliquis heres existat, nullius in bonis sunt' Dig. 1. 8. 1 pr. It became, in fact, a juristic person, as capable, in many respects, of acquiring rights and incurring liabilities as a natural person: 'hereditas non heredis personam sed defuncti sustinet, ut multis argumentis iuris civilis comprobatum est' Dig. 41. 1. 34: 'mortuo reo promittendi et ante aditam hereditatem fideiussor accipi potest, quia hereditas personae vice fungitur, sicuti municipium et decuria et societas' Dig. 46. 1. 22.

There is no precise resemblance between the Roman heres and the English heir. The latter is the person who ultimately succeeds to such real property of a deceased person as he has not disposed of by will: the former was the person who succeeded to the universitas iuris of a deceased, whether under a will or an intestacy: and succeeding as he did to the universitas iuris, there was necessarily no more distinction between realty and personalty than between rights and liabilities.

Until the hereditas had vested in an heir or heirs, and so lost its independent existence, it remained a persona under the name of hereditas iacens. In the heir or heirs, taken collectively, it can vest only as a whole: until it has so vested, the rights and liabilities of which it consists are inseparable. Where there is no will, this is not difficult to realise even to a mind habituated to the English distinction between realty and

ut de his dispiciamus, quae vobis ex testamento obveniunt. qua in re necessarium est initio de ordinandis testamentis exponere.

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personalty: but even where there was a will, the testator could not begin by saying 'I bequeath so and so to A': he must first give it to the heir or heirs, as a part of the aggregate universitas, and charge them to give it to the intended legatee. Universality of succession is thus the prime characteristic of the Roman law of inheritance: 'nihil est aliud hereditas quam successio in universum ius, quod defunctus habuit' Dig. 50. 16. 24.

The answer to the question, to whom the hereditas belongs, or who is entitled to become heres, depends upon the further question, whether the deceased has left behind him a valid testament. There is reason to believe that at one time wills were unknown in Roman law: that when a man died, his universitas iuris devolved on a person or persons by rules rigidly prescribed by law, which he had no power to alter or override. But the testamentary power, when once admitted, was very generally exercised: which will perhaps account for its being treated first by both Gaius and Justinian. The two modes of succession are mutually exclusive. If a man made a will, all his property (unless he were a soldier) must perforce go to the heir or heirs therein instituted, even though expressly instituted to certain portions of it only: there was nothing left for the rules of intestate succession to operate on, or to go to the person or persons who would have succeeded him had he died intestate: 'neque enim idem ex parte testatus et ex parte intestatus decedere potest, nisi sit miles' (Tit. 14. 5 inf.: cf. Cicero, de Invent. 2. 21).

Two other technical terms require a brief explanation. In some cases the law cast the inheritance upon a person or persons whether they wished it or not, Tit. 19. 1 and 2 inf.: immediately upon a man's decease they became heirs *ipso facto*, and could in no way at law disencumber themselves of the legal rights and duties, taken in the aggregate, which that character imposed upon them. But in other cases (Tit. 19. 5 inf.) no one became heres immediately, though some one (or more) was entitled to become so if he pleased: here, as soon as it was known who was the person so entitled, the hereditas was said to be 'delata' to him: delatio is the right actually to become heir: 'delata hereditas intellegitur, quam quis possit adeundo consequi' Dig. 50. 16. 151. If, after consideration, he decides that the inheritance is worth taking, delatio is followed by aditio (Tit. 19. 5 and 7 inf.), actual acceptance of the succession. First comes the death; then delatio; and finally, after a greater or less interval, aditio. But, whether the law makes one heir nolens volens, or whether one deliberately accepts the inheritance after fully weighing its advantages and disadvantages, one cannot get rid of the character of heres, with all its liabilities, when one has once been invested with it: 'semel heres, semper heres.' How far this principle, as well as the other already cited supr. from Tit. 14. 5, had been modified at the end of Justinian's legislative work will appear from the following Titles.

X

DE TESTAMENTIS ORDINANDIS

Testamentum ex eo appellatur, quod testatio mentis est.
1 Sed ut nihil antiquitatis penitus ignoretur, sciendum est
G. ii. 101. olim quidem **duo genera testamentorum** in usu fuisse, quorum altero **in pace et in otio** utebantur, quod **calatis comitiis** appellabatur, altero, cum in **proelium exituri** essent, quod
G. ii. 102. procinctum dicebatur. **accessit deinde tertium genus testamentorum, quod** dicebatur **per aes et libram, scilicet quia per emancipationem,** id est imaginariam quandam venditionem, agebatur **quinque testibus et libripende civibus Romanis puberibus** praesentibus et eo qui **familiae emptor** dicebatur.
G. ii. 103. **sed illa quidem** priora **duo genera testamentorum** ex veteribus temporibus **in desuetudinem abierunt : quod vero per aes et libram** fiebat, licet diutius permansit, attamen partim et hoc
2 **in usu** esse desiit. Sed praedicta quidem nomina testamentorum ad ius civile referebantur. postea vero ex edicto prae-

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Tit. X. 1. The will in calatis comitiis was in reality a legislative act of the whole populus in the comitia at Rome : Serv. ad Verg. Aen. vii. 612 ; Velleius Paterc. 2. 5 ; Plutarch, Coriol. 9 : for the evidence hereby afforded that intestate was older than testamentary succession see Maine, Ancient Law, pp. 199, 200. The proceedings were of course entirely oral. According to some writers, the will in procinctu, which was of later origin, was originally somewhat the same in character, being made before the whole people in arms just before starting for a campaign, though here their function was evidentiary rather than legislative. Others think that the soldier merely declared his will in the presence of some of his comrades in arms : this is supported by Festus : 'in procinctu factum testamentum dicitur, quod miles pugnaturus nuncupat praesentibus commilitonibus,' cf. Plut. Cor. 9. The will made per aes et libram was perhaps due in origin to the plebeians, who had no locus standi in the comitia calata, though it must have been largely used by the patricians, owing to the length of the intervals at which wills could be made in the comitia, 'quae bis in anno testamentis faciendis destinata erant' Gaius ii. 101 : (probably on March 24 and May 24 : Girard, 4th. ed., p. 798, note 1). When writing came into general use, so that the proceedings need no longer be entirely oral, it underwent important changes, which are noticed by Gaius ii. 103–108, and alluded to here by Justinian (partim in usu esse desiit), in particular acquiring the property of secrecy. The will in procinctu, which was common a few years before the conquest of Numantia, Velleius Paterc. 2. 5, was obsolete in the time of Cicero, de Nat. Deor. 2, 3.

§ 2. The praetorian will, as it is usually called, was really no will at all :

toris alia forma faciendorum testamentorum introducta est: iure enim honorario nulla emancipatio desiderabatur, sed septem testium signa sufficiebant, cum iure civili signa testium non erant necessaria. Sed cum paulatim tam ex usu homi- 3

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for a will is a disposition of the civil law, bestowing the hereditas, and the person taking under it is heres. It grew out of the irksomeness of the formalities required in the will per aes et libram, and of the grave injustice which must frequently have resulted from the avoidance of wills through trivial defects of form, which eventually induced the praetors to uphold incomplete mancipatory testaments. Regarding form as of value only so far as it secured evidence, all that they required was that the written tabulae of the will should be attested by the seals of seven competent witnesses: (Justinian's remark that sealing had not been necessary by the civil law seems contradicted by Cicero (in Verr. 2. 1. 45), who says that the edict required 'tabulas testamenti obsignatas non minus multis signis quam e lege oportet'). How far, and in what sense, such dispositions were upheld is deserving of careful notice, for nothing affords a more instructive or characteristic illustration of the mode in which the praetorian law modified and supplemented the old ius civile. By the latter, such an instrument as a mere written document, no matter by how many witnesses attested, had absolutely no validity whatever for the purpose intended. Nor had the praetor authority to enact that it should avail to pass the hereditas, or that the person named in it as heir should *be* heir: 'quos autem praetor vocat ad hereditatem, hi heredes ipso quidem iure non fiunt: nam praetor heredes facere non potest' Gaius iii. 32, Tit. 9. 2 inf., Ulpian, Reg. 28. 12. What he could, and did, do was to say that if the person named as heir in the informal will applied to him, he would award him the bonorum possessio (i.e. bonitarian ownership, Gaius iii. 80, cf. Dig. 41. 1. 52, cited on p. 197 supr.) on condition of his executing the directions therein contained, and would protect him in that possession by special remedies until usucapio had converted it into ownership: the bonorum possessor 'loco heredis constituitur' Gaius, loc. cit.: he is 'velut heres' Dig. 5. 5. 1. Gaius tells us (ii. 119) that the praetor would not uphold such a will in favour of an extraneous person instituted therein if any one entitled ab intestato 'legitimo iure' insisted on his strict legal rights. His illustrations of such persons are all agnates; and the question arises, what if a suus heres of the testator put forward such a claim? If he were not disinherited nominatim in the will, it is obvious that the praetor would hold it void: if he were, it would seem that he would uphold the will against him in any case. But by a rescript of Antoninus Pius (Gaius ii. 120) the instituted heir was enabled to repel the claim of the agnate by pleading exceptio doli, and the praetorian will thus became impregnable. The gradual development of bonorum possessio into a supplementary scheme of succession by the side of the hereditas is sketched in an Excursus at the end of Bk. iii.

§ 3. This is usually called testamentum tripertitum. Theodosius II

num quam ex constitutionum emendationibus coepit in unam consonantiam ius civile et praetorium iungi, constitutum est, ut uno eodemque tempore, quod ius civile quodammodo exigebat, septem testibus adhibitis et subscriptione testium, quod ex constitutionibus inventum est, et ex edicto praetoris signacula testamentis imponerentur: ut hoc ius tripertitum esse videatur, ut testes quidem et eorum praesentia uno contextu testamenti celebrandi gratia a iure civili descendant, subscriptiones autem testatoris et testium ex sacrarum constitutionum observatione adhibeantur, signacula autem et
4 numerus testium ex edicto praetoris. Sed his omnibus ex nostra constitutione propter testamentorum sinceritatem, ut nulla fraus adhibeatur, hoc additum est, ut per manum testatoris vel testium nomen heredis exprimatur et omnia secundum illius constitutionis tenorem procedant.

5 Possunt autem testes omnes et uno anulo signare testamentum (quid enim, si septem anuli una sculptura fuerint?) secundum quod Pomponio visum est. sed et alieno quoque
6 anulo licet signare. Testes autem adhiberi possunt ii, cum quibus testamenti factio est. sed neque mulier neque impubes neque servus neque mutus neque surdus neque furiosus nec

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(Cod. 6. 23. 21) first required that the witnesses should subscribe as well as seal the will: the adscriptio or adnotatio mentioned in Dig. 28. 1. 22. 4, ib. 30, refers to the practice of the witnesses writing their names under or near the seal by which the will was fastened in order to facilitate their attendance when it was opened: Dig. 29. 3. 4–7; Paul. Sent. Rec. 4. 6. 1. The same emperor required that the testator must either sign the document, or have it signed for him by an eighth witness if unable to write himself. If, however, the whole will was expressly stated upon its face to be written by his own hand, his signature was unnecessary (testamentum holographum, Cod. 6. 23. 28. 6).

§ 4. Justinian subsequently repealed this rule, which is found in Cod. 6. 23. 29, by Nov. 119. 9. A SC. Libonianum of the time of Tiberius had enacted that if one man wrote out a will for another, any disposition which it contained in his own favour should be void: later an edictum of Claudius subjected the writer to the penalties of the lex Cornelia de falsis, Bk. iv. 18. 7 inf.

§ 6. Capacity was required in a witness only at the time of the execution of the will. Testamenti factio means capacity (*a*) to make a will, (*b*) to take under a will either as heir or legatee, (*c*) as here, to witness a will; the common element seems to be the presence of commercium, for slaves could be instituted or made legatees in virtue of the com-

cui bonis interdictum est nec is, quem leges iubent improbum
intestabilemque esse, possunt in numero testium adhiberi.
Sed cum aliquis ex testibus testamenti quidem faciendi tem- 7
pore liber existimabatur, postea vero servus apparuit, tam
divus Hadrianus Catonio Vero quam postea divi Severus et
Antoninus rescripserunt subvenire se ex sua liberalitate testa-
mento, ut sic habeatur, atque si ut oportet factum esset, cum
eo tempore, quo testamentum signaretur, omnium consensu
hic testis liberorum loco fuerit nec quisquam esset, qui ei status
quaestionem moveat. Pater nec non is, qui in potestate 8
eius est, item duo fratres, qui in eiusdem patris potestate
sunt, utrique testes in unum testamentum fieri possunt : quia
nihil nocet ex una domo plures testes alieno negotio adhiberi.
In testibus autem non debet esse qui in potestate testatoris 9 G.ii.105.
est. sed si filius familias de **castrensi peculio post missionem**
faciat testamentum, nec pater eius recte testis adhibetur nec G. ii. 106.
is qui in potestate eiusdem **patris est : reprobatum est** enim

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mercium of their master : *οἱ οἰκέται ἀπρόσωποι ὄντες ἐκ τῶν προσώπων τῶν οἰκείων δεσπότων χαρακτηρίζονται* Theoph. ad iii. 17 pr. inf. The other classes of persons mentioned in this and the following sections could not be witnesses on other grounds than want of commercium, except the interdicted prodigal, 'cui commercio interdictum est' Ulpian, Reg. 20. 13. Improbi et intestabiles were unable to be witnesses themselves or to avail themselves of the testimony of other persons ; they include, besides the case mentioned in the Twelve Tables ('qui se sierit testarier libripensve fuerit, ni testimonium fariatur, improbus intestabilisque esto'), convicted libellers and lampooners, Dig. 28. 1. 18. 1 ; heretics, Cod. 1. 5. 4 ; and apostates, Cod. 1. 7. 4. Persons convicted of adultery (Dig. 22. 5. 14), and perhaps of repetundae (ib. 15 pr. : per contra Ulpian in Dig. 28. 1. 20. 5) were also prohibited from being witnesses. Oral testaments only (§ 14 inf.) could be witnessed by blind persons.

§ **7**. This rescript of Hadrian is in Cod. 6. 23. 1. Probably its principle might be extended to other cases of incapacity, on the analogy of Dig. 14. 6. 3 pr. (de SC. Macedoniano) 'si quis patremfamilias esse credidit non vana simplicitate deceptus nec iuris ignorantia, sed quia publice paterfamilias plerisque videbatur, sic agebat, sic contrahebat, sic muneribus fungebatur, cessabit senatusconsultum'.

§ **9**. In the mancipatory form of will no witness might be in the potestas of either the testator or familiae emptor, Gaius ii. 105. The incapacity of a paterfamilias or any one in his power to witness his own son's will of castrense peculium, though affirmed by Justinian here after Gaius (ii. 106), is denied by Ulpian in Dig. 28. 1. 20. 2 on the authority of Marcellus.

10 **in ea re domesticum testimonium.** Sed neque heres scriptus neque is qui in potestate eius est neque pater eius qui habet eum in potestate neque fratres qui in eiusdem patris potestate
G. ii. 105. sunt testes adhiberi possunt, **quia totum hoc negotium, quod agitur testamenti ordinandi gratia, creditur** hodie **inter** heredem **et testatorem agi.** licet enim totum ius tale conturbatum fuerat et veteres, qui familiae emptorem et eos, qui per potestatem ei coadunati fuerant, testamentariis testimoniis repellebant, heredi et his, qui coniuncti ei per potestatem fuerant, concedebant testimonia in testamentis praestare, licet hi, qui id permittebant, hoc iure minime abuti debere eos suadebant: tamen nos eandem observationem corrigentes et, quod ab illis suasum est, in legis necessitatem transferentes ad imitationem pristini familiae emptoris merito nec heredi, qui imaginem vetustissimi familiae emptoris optinet, nec aliis personis, quae ei ut dictum est coniunctae sunt, licentiam concedimus sibi quodammodo testimonia praestare: ideoque nec eiusmodi
11 veterem constitutionem nostro codici inseri permisimus. Le-
Cf.G.ii.108. gatariis autem et fideicommissariis, quia non iuris successores sunt, et aliis personis eis coniunctis testimonium non denegamus, immo in quadam nostra constitutione et hoc specialiter concessimus, et multo magis his, qui in eorum potestate sunt, vel qui eos habent in potestate, huiusmodi licentiam damus.
12 Nihil autem interest, testamentum in tabulis an in chartis
13 membranisve vel in alia materia fiat. Sed et unum testamentum pluribus codicibus conficere quis potest, secundum optinentem tamen observationem omnibus factis. quod inter-

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Probably the two passages relate to different cases: the latter to a will made by the son as soldier, that before us to one made after discharge.

§ 10. Though by strict law the heir and persons connected with him by the tie of potestas had not been incompetent to witness ('testamentum simul obsignavi cum Clodio . . . et illum heredem et me scripserat' Cic. pro Milone 18: cf. Poste's Gaius, p. 206), it was deemed improper for them to do so (Gaius ii. 108), and Ulpian expressly affirms their incompetence in Dig. 28. 1. 20 pr. It is conjectured that this last passage either is an interpolation, or relates only to praetorian wills, as Justinian in this section speaks as if he had made a complete change in excluding the testimony of these persons.

§ 13. Cf. Suetonius, Octav. 101 'testamentum duobus codicibus scriptum', and ib. Tiber. 76 'testamentum duplex, eodem exemplo'. For the necessity of each copy being formally executed see Dig. 37. 11. 1. 7 'si . . .

dum et necessarium est, si quis navigaturus et secum ferre et domi relinquere iudiciorum suorum contestationem velit, vel propter alias innumerabiles causas, quae humanis necessitatibus
imminent. Sed haec quidem de testamentis, quae in scriptis 14
conficiuntur. si quis autem voluerit sine scriptis ordinare iure civili testamentum, septem testibus adhibitis et sua voluntate coram eis nuncupata sciat hoc perfectissimum testamentum iure civili firmumque constitutum.

XI

DE MILITARI TESTAMENTO

Supra dicta **diligens observatio in ordinandis testamentis** G. ii. 109.
militibus propter nimiam imperitiam constitutionibus principalibus remissa est. nam quamvis hi neque legitimum numerum testium adhibuerint neque aliam testamentorum sollemnitatem

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unum fecerit testator quasi testamentum, aliud quasi exemplum (i. e. a mere copy, without observance of form) si extat quod exemplum erat, bonorum possessio peti non poterit '.

§ 14. The purely oral or nuncupative will here described seems to have originated with Theodosius II: Cod. 6. 23. 21. 4. The statement in Tit. 11. 1 inf., that even civilians could make a will without writing in Trajan's time, can only refer to one formally executed per aes et libram.

Besides the private forms already noticed, a will might be 'publice confectum' either (1) by being oblatum by petition to the emperor, Cod. 6. 23. 19, or (2) by a statement of its contents, usually accompanied by a copy, being made to a judge, who entered a minute thereof in the official acta, Cod. loc. cit. 18.

Tit. XI. The exemption of soldiers from the ordinary requirements of testamentary form dates from the time of Augustus: Ulp. Reg. 20. 10. A soldier's will (1) if written, did not require to be witnessed at all: *ἀμαρτύρους . . . κυροῦσθαι τὰς διατάξεις, ὥσπερ ἐπὶ τῶν ἐν παρατάξει πιπτόντων ὡρίσατο*, Nov. Leonis 40, though § 1, 'convocatis ad hoc hominibus,' might seem to imply the contrary: (2) if oral, and declared to only a single witness, would not suffice to make the latter heir himself, § 1. By the enactment to which he refers (Cod. 6. 21. 17) Justinian allowed the exercise of this privilege by a soldier only while he was in camp or barracks on actual service (this being the meaning of expeditio in the text), not while on furlough: and a will so executed remained in force only one year after his discharge, § 3 inf., and even lost all validity if the discharge was 'with ignominy'.

It was not merely in respect of form that soldiers' wills were privileged. They were not bound by the rule 'nemo pro parte testatus, pro parte intestatus decedere potest' Tit. 14. 5 inf., or by the lex Falcidia and similar enactments relating to fideicommissa: they need not formally

observaverint, **recte nihilo minus testantur,** videlicet cum in expeditionibus occupati sunt : quod merito nostra constitutio induxit. quoquo enim modo voluntas eius suprema sive scripta inveniatur sive sine scriptura, valet testamentum ex voluntate eius. illis autem temporibus, per quae citra expeditionum necessitatem in aliis locis vel in suis sedibus degunt, minime ad vindicandum tale privilegium adiuvantur : sed testari quidem et si filii familias sunt propter militiam conceduntur, iure tamen communi, ea observatione et in eorum testamentis adhibenda, quam et in testamentis paganorum
1 proxime exposuimus. Plane de militum testamentis divus Traianus Statilio Severo ita rescripsit : ' Id privilegium, quod militantibus datum est, ut quoquo modo facta ab his testamenta rata sint, sic intellegi debet, ut utique prius constare debeat testamentum factum esse, quod et sine scriptura a non militantibus quoque fieri potest. is ergo miles, de cuius bonis apud te quaeritur, si convocatis ad hoc hominibus, ut voluntatem suam testaretur, ita locutus est, ut declararet, quem vellet sibi esse heredem et cui libertatem tribuere, potest videri sine scripto hoc modo esse testatus et voluntas eius rata habenda est. ceterum si, ut plerumque sermonibus fieri solet, dixit alicui : " ego te heredem facio " aut " tibi bona mea relinquo ", non oportet hoc pro testamento observari. nec ullorum magis interest quam ipsorum, quibus id privilegium datum est, eiusmodi exemplum non admitti : alioquin non difficulter post mortem alicuius militis testes existerent, qui adfirmarent se audisse dicentem aliquem relinquere se bona,

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disinherit their children, Tit. 13. 6 inf., nor were their wills avoided by their undergoing capitis deminutio (§ 5 inf., Dig. 28. 3. 6. 6) : they could institute as heirs persons who could not inherit from an ordinary testator (Gaius ii. 110), and could dispose of the inheritance by codicils, Dig. 29. 1. 36 pr.

The wills of certain other persons besides soldiers were privileged in the matter of form. By an enactment of Justinian the general law might in rural districts be overridden by local custom, and signature by the witnesses was dispensed with if it was difficult to find seven who could write, and even five were held enough if more could not be got, Cod. 6. 23. 31. Where a man disposed of his property solely in favour of his own descendants, his will, if written, need not be attested (' testamentum parentium inter liberos ' Nov. 107. 1).

cui visum sit, et per hoc iudicia vera subvertantur.' Quin 2
immo et mutus et surdus miles testamentum facere possunt.
Sed hactenus hoc illis a principalibus constitutionibus conce- 3
ditur, quatenus militant et in castris degunt: post missionem vero veterani vel extra castra si faciant adhuc militantes testamentum, communi omnium civium Romanorum iure facere debent. et quod in castris fecerint testamentum non communi iure, sed quomodo voluerint, post missionem intra annum tantum valebit. quid igitur, si intra annum quidem decesserit, condicio autem heredi adscripta post annum extiterit? an quasi militis testamentum valeat? et placet valere
quasi militis. Sed et si quis ante militiam non iure fecit testa- 4
mentum et miles factus et in expeditione degens resignavit illud et quaedam adiecit sive detraxit vel alias manifesta est militis voluntas hoc valere volentis, dicendum est valere testa-
mentum quasi ex nova militis voluntate. Denique et si in 5
adrogationem datus fuerit miles vel filius familias emancipatus est, testamentum eius quasi militis ex nova voluntate valet nec videtur capitis deminutione irritum fieri.

Sciendum tamen est, quod ad exemplum castrensis peculii 6
tam anteriores leges quam principales constitutiones quibusdam quasi castrensia dederunt peculia, quorum quibusdam permissum erat etiam in potestate degentibus testari. quod nostra constitutio latius extendens permisit omnibus in his tantummodo peculiis testari quidem, sed iure communi: cuius constitutionis tenore perspecto licentia est nihil eorum quae ad praefatum ius pertinent ignorare.

XII

QUIBUS NON EST PERMISSUM TESTAMENTA FACERE

Non tamen omnibus licet facere testamentum. statim enim hi, qui alieno iuri subiecti sunt, testamenti faciendi ius non

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§ **2**. By Cod. 6. 22. 10 all deaf or dumb people who could speak or write were enabled to make a will. Perhaps the text means that a soldier who was deaf or dumb might do so even by signs: for analogies cf. Dig. 29. 1. 15. 1; 29. 7. 8. 4; 32. 21 pr.

Tit. XII. So far as commercium is an element in the capacity to make a valid will (testamenti factio activa) it was (except in the case of the prodigus, § 2 inf.) required to exist both at the time of execution and at

habent, adeo quidem ut, quamvis parentes eis permiserint, nihilo magis iure testari possint: exceptis his quos antea enumeravimus et praecipue militibus qui in potestate parentum sunt, quibus de eo quod in castris adquisierint permissum est ex constitutionibus principum testamentum facere. quod quidem initio tantum militantibus datum est tam ex auctoritate divi Augusti quam Nervae nec non optimi imperatoris Traiani, postea vero subscriptione divi Hadriani etiam dimissis militia, id est veteranis, concessum est. itaque si quidem fecerint de castrensi peculio testamentum, pertinebit hoc ad eum quem heredem reliquerint: si vero intestati decesserint nullis liberis vel fratribus superstitibus, ad parentes eorum iure communi pertinebit. ex hoc intellegere possumus, quod in castris adquisierit miles, qui in potestate patris est, neque ipsum patrem adimere posse neque patris creditores id vendere vel aliter inquietare neque patre mortuo cum fratribus esse commune, sed scilicet proprium eius esse id quod in castris adquisierit, quamquam iure civili omnium qui in potestate parentum sunt peculia perinde in bonis parentum computantur, ac si servorum peculia in bonis dominorum numerantur; exceptis videlicet his, quae ex sacris constitutionibus et praecipue nostris propter diversas causas non adquiruntur. praeter hos igitur, qui castrense peculium vel quasi castrense habent, si quis alius filius familias testamentum fecerit, inutile est, licet

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that of the testator's decease. If at any moment between these two dates he lost it, the will, iure civili, became void, except in the case of capture in war, § 5 inf.: and a will invalidated by the testator's undergoing capitis deminutio minima might be upheld by the praetor: see on Tit. 17. 6 inf.: cf. Gaius ii. 147, Ulpian, Reg. 23. 6: Dig. 37. 11. 1. 8.

The requirement of commercium excluded (1) slaves, though a servus populi Romani might make a will of half his peculium, Ulpian, Reg. 20. 16. (2) The interdicted prodigal, § 2 inf., see note on Tit. 10. 6 supr. (3) The citizen in captivity, § 5 inf. (4) Peregrini, including dediticii; if, however, an alien belonged to a determinate state, he could make a valid will according to its laws, Ulpian, Reg. 20. 14. A citizen who was convicted on a capital charge either became a slave, or underwent capitis deminutio media, whereby he became a peregrinus: but not belonging to any particular state he could not make a will of any kind, Dig. 28. 1. 8. 6. Latini Iuniani were disqualified by the lex Iunia Norbana, Gaius i. 23, Ulpian, Reg. 20. 14; see p. 117 supr.: for the testamentary capacity of women see p. 149 supr.

suae potestatis factus decesserit. Praeterea testamentum 1
facere non possunt impuberes, quia nullum eorum animi iudicium est: item furiosi, quia mente carent. nec ad rem pertinet, si impubes postea pubes factus aut furiosus postea compos mentis factus fuerit et decesserit. furiosi autem si per id tempus fecerint testamentum, quo furor eorum intermissus est, iure testati esse videntur, certe eo quod ante furorem fecerint testamento valente: nam neque testamenta recte facta neque aliud ullum negotium recte gestum postea furor
interveniens peremit. Item prodigus, cui bonorum suorum 2
administratio interdicta est, testamentum facere non potest, sed id quod ante fecerit, quam interdictio ei bonorum fiat,
ratum est. Item mutus et surdus non semper facere testa- 3
mentum possunt. utique autem de eo surdo loquimur, qui omnino non exaudit, non qui tarde exaudit: nam et mutus is intellegitur, qui eloqui nihil potest, non qui tarde loquitur. saepe autem etiam litterati et eruditi homines variis casibus et audiendi et loquendi facultatem amittunt: unde nostra constitutio etiam his subvenit, ut certis casibus et modis secundum normam eius possint testari aliaque facere quae eis permissa sunt. sed si quis post testamentum factum valetudine aut quolibet alio casu mutus aut surdus esse coeperit, ratum nihilo

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A will of castrense peculium, unless executed while the testator was on actual service, was not exempted from any of the ordinary requirements of form. For subscriptio [Hadriani] see p. 104 supr., and for the succession to peculium castrense on intestacy note on Bk. iii. 1. 15 inf. Of peculium adventitium a filiusfamilias could in no case dispose by will, even with his pater's consent (Dig. 28. 1. 6 pr.); nor make gifts from it mortis causa, which, however, he could do from peculium profectitium with his father's sanction, Dig. 39. 5. 7. 4; 39. 6. 25. 1. He was enabled to make a will of quasi castrense peculium by Justinian.

§ 1. The reason of the furiosus' inability to make a will (quia mente caret) is, perhaps, an allusion to the definition of testamentum as testatio mentis, Tit. 10 pr. supr. Whether he could do so in a lucid moment had at one time been disputed, Cod. 6. 22. 9.

§ 3. Deaf or dumb persons had been altogether unable to make a will per aes et libram, the former, 'quoniam verba familiae emptoris exaudire non potest,' the latter, 'quoniam verba nuncupationis loqui non potest' Ulpian, Reg. 20. 13. By Cod. 6. 22. 10 Justinian removed the incapacity, save from those who were deaf and dumb from birth (except perhaps soldiers, Tit. 11. 2 supr.), but he required those who were dumb to write their own wills throughout.

4 minus eius remanet testamentum. Caecus autem non potest facere testamentum nisi per observationem, quam lex divi
5 Iustini patris mei introduxit. Eius, qui apud hostes est, testamentum quod ibi fecit non valet, quamvis redierit: sed quod dum in civitate fuerat fecit, sive redierit, valet iure postliminii, sive illic decesserit, valet ex lege Cornelia.

XIII

DE EXHEREDATIONE LIBERORUM

G. ii. 115. **Non tamen, ut** omnimodo **valeat testamentum, sufficit haec**
G. ii. 123. **observatio, quam supra exposuimus.** sed **qui filium in potestate habet, curare debet, ut eum heredem instituat vel exheredem nominatim faciat: alioquin si eum silentio praeterierit, inutiliter testabitur, adeo quidem ut, etsi vivo patre**

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§ 4. The execution of a blind man's will required the presence of a notary, or, if one could not be procured, of an additional witness, and all eight had to sign and seal the testament, Cod. 6. 22. 8.

§ 5. The will of a civis who was taken captive by the enemy was avoided by his capitis deminutio maxima unless rehabilitated by postliminium (note on Bk. 1. 12. 5 supr.); if he died apud hostes he must needs die intestate. This was remedied by a lex Cornelia of uncertain date, which fictitiously represented the testator as having died before being taken prisoner (fictio legis Corneliae): 'lege Cornelia testamenta eorum, qui in hostium potestate decesserunt, perinde confirmantur ac si hi, qui ea fecissent, in hostium potestatem non pervenissent' Dig. 28. 1. 12. The principle of the fiction was subsequently extended to all rights and dispositions whatever, 'in omnibus partibus iuris is, qui reversus non est ab hostibus, quasi tunc decessisse videtur, cum captus esset' Dig. 49. 15. 18. For the early law relating to the testamentary capacity of women see note on p. 149 supr. Hadrian enabled freeborn women who were sui iuris to make a will with the auctoritas of their guardians, Gaius i. 115 a, and the praetor gave bonorum possessio under a will made without such auctoritas, Gaius ii. 118–122.

Tit. XIII. Having ascertained who can make wills (Tit. 12) and in what necessary form, if any, they must be expressed (Tits. 10 and 11), Justinian proceeds to their necessary or most usual contents, viz. exheredations (Tit. 13), the institution of the heir or heirs (Tit. 14), and substitutions (Tits. 15 and 16).

The practice of exheredation, based on the patria potestas, § 7, is peculiarly Roman, and a clear survival of the old joint ownership of property by family groups, Gaius ii. 157, Dig. 28. 2. 11, Tit. 19. 2 inf. The Roman law regarded certain of a man's relations as having so strong a claim to succeed to his property, that it required him, if he wished effectually to exclude them, to disinherit them in his will, i. e. by a legislative

filius mortuus sit, nemo ex eo testamento heres existere possit, quia scilicet ab initio non constiterit testamentum. sed non ita de filiabus vel aliis per virilem sexum descendentibus liberis utriusque sexus fuerat antiquitati observatum: sed si non fuerant heredes scripti scriptaeve vel exheredati exheredataeve, testamentum quidem non infirmabatur, ius autem adcrescendi eis ad certam portionem praestabatur. sed nec nominatim eas personas exheredare parentibus necesse erat, sed licebat et inter ceteros hoc facere.

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act; not, as we should, by simply not mentioning them at all, but by explicitly stating his desire that they should not be his heirs. Merely to pass them over, without either instituting them heirs or expressly disinheriting them, did not exclude them at all; it simply avoided the will, either in whole, or in part. What classes of relations the civil and the praetorian law respectively required should be thus disinherited, the forms by which exheredation was effected, and the final changes made in this department by Justinian, appear in this Title. There is an interesting discussion of the origin and history of exheredatio in Mr. J. L. Strachan-Davidson's Problems of the Roman Criminal Law, vol. i, pp. 85–95.

Whether a will was void, in which a filiusfamilias of the first degree, who died after its execution in the testator's lifetime, was praeteritus or not disinherited in proper form, had been a question between the two schools of jurists. The Sabinians, whose opinion Justinian here confirms, pronounced it void ab initio; the Proculians held that it was void only if the son in question outlived the testator, Gaius ii. 123.

Sui in the first degree, i.e. the testator's own sons, natural or adoptive, if in his power at the time of the execution of the will (see Tit. 19. 2 inf.), were required by the civil law to be either instituted, or disinherited nominatim, in the form given in this section. As regards all sui and suae except sons, the civil law was satisfied if, in default of institution, they were disinherited by a general clause ('ceteri exheredes sunto' Gaius ii. 128, which, if Justinian in Cod. 6. 28. 4. 2 is to be believed, would originally be enough for sons as well). The civil law effect of pretermitting these was not (as in the case of a son) to avoid the will, but merely to entitle them to a share in the succession varying with the character of the instituted heir or heirs. If these were sui, the praeteriti took share and share alike with them (adcrescunt in virilem portionem); if extranei (Tit. 19. 3 inf.) they were entitled to half the inheritance; for illustrations see Gaius ii. 124. An extraneus, however, who was instituted heir in a will in which such persons were praeteriti, was more hardly treated by the praetor, who gave the praeteriti bonorum possessio (contra tabulas) of the whole, 'qua ratione extranei heredes a tota hereditate repelluntur' Gaius ii. 125; but a rescript of M. Aurelius again curtailed the rights of suae praeteritae by enacting that they should in no case take more by bonorum possessio contra tabulas than they would have taken by the

G. ii. 127. 1 **Nominatim autem exheredari** quis **videtur, sive ita exheredetur 'Titius filius meus exheres esto', sive ita 'filius meus exheres esto' non adiecto proprio nomine,** scilicet si alius
G. ii. 130. filius non extet. **postumi quoque liberi vel heredes institui**
G. ii. 131. **debent vel exheredari. et in eo par omnium condicio est, quod et in filio postumo et in quolibet ex ceteris liberis sive feminini sexus sive masculini praeterito valet quidem testamentum, sed postea adgnatione postumi sive postumae rumpitur et ea ratione totum infirmatur: ideoque si mulier, ex qua postumus aut postuma sperabatur, abortum fecerit, nihil impedimento est scriptis heredibus ad hereditatem ad-**
G. ii. 132. **eundam. sed feminini quidem sexus personae vel nominatim vel inter ceteros exheredari** solebant, **dum tamen, si inter**

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ius adcrescendi of the civil law (ib. 126); the effect of this was to augment the rights of pretermitted sui not in the first degree (e.g. grandsons).

The praetor, not satisfied with the civil law rules of exheredation in respect of persons in the testator's power, required all sui—grandsons, greatgrandsons, etc., no less than sons, to be disinherited nominatim, promising them in default bonorum possessio contra tabulas (Gaius ii. 129); according to which, though the will remained formally valid, the inheritance was divided among all the sui, whether instituted or not disinherited nominatim, as under the rules of intestacy, Dig. 37. 4. 1. 1. To summarise what has been said—unless instituted.

(1) Sui filii must be disinherited nominatim; else the will is void, and the man dies intestate.

(2) Other sui may (*a*) iure civili be disinherited inter ceteros; in default, they are entitled either to the ius adcrescendi or to half the inheritance; (*b*) iure praetorio, they must be disinherited nominatim; in default, if the institutus is extraneus, they can get bonorum possessio of the whole; as against instituted sui they are entitled to have the bona distributed 'tanquam intestatus decessisset'.

(3) Suae of whatever grade may be disinherited by a general clause: in default (*a*) iure civili, the will is not void, but they are entitled to the ius adcrescendi; (*b*) iure praetorio, they could claim bonorum possessio of the whole against an extraneus heres until the rescript of M. Aurelius, when the older law (by which they got half) was in effect restored.

§ 1. Speaking generally, a postumus is a person who is born after the making of a will: postumi sui are those persons who come under the *immediate* (Tit. 19. 2 inf.) power of the testator after the execution of the will, or would have done so, if he had not died first. Thus they comprise (1) postumi sui proper, the testator's own children, sons and daughters, born after the execution of the will, who become sui by the mere fact of birth; (2) persons postumorum suorum loco, i.e. (*a*) those adopted or adrogated, and children legitimated by the testator after making the will,

ceteros exheredentur, aliquid eis legetur, ne videantur per oblivionem praeteritae esse, masculos vero postumos, id est filium et deinceps, **placuit non aliter recte exheredari, nisi nominatim exheredentur, hoc scilicet modo : ' quicumque mihi filius genitus fuerit, exheres esto.'**

2 G. ii. 133. **Postumorum autem loco sunt et hi, qui in sui heredis locum succedendo quasi adgnascendo fiunt parentibus sui heredes. ut ecce si quis filium et ex eo nepotem neptemve in potestate habeat, quia filius gradu praecedit, is solus iura sui heredis habet quamvis nepos quoque et neptis ex eo in eadem potestate sunt : sed si filius eius vivo eo moriatur aut qualibet alia ratione exeat de potestate eius, incipit nepos neptisve in eius locum succedere et eo modo**

Gaius ii. 138, Tit. 17. 1 inf., Ulpian, Reg. 23. 3 ; (*b*) filiifamilias or filiaefamilias who become sui by ' successio in suorum heredum locum ' as described in Gaius ii. 133, and § 2 inf. ; and (*c*) the child who fell under the immediate power and so became suus heres of his soldier father by the death of the grandfather in whose power both of them had previously been : he is postumus in relation to his father's will of castrense peculium made while a filiusfamilias, Dig. 28. 2. 28. 1.

Postumi were ' incertae personae ' (Tit. 20. 25 inf.), Gaius ii. 242, and therefore by the old law could be neither instituted heirs nor disinherited, Ulpian, Reg. 22. 4 : consequently, if they were sui, the will necessarily became void. It was only by very gradual steps that it became possible to institute or disinherit postumi sui. In the most pressing case, viz. where a postumus suus was born after the testator's decease, so that he could not mend matters by executing a fresh will—the civil law itself tolerably early permitted his institution or exheredation, Ulpian, Reg. 22. 19. Doubtless the rule was the same in respect of a grandchild in utero whose father was no longer in the testator's power at the time of the making of the will, though he had been when the child was conceived. Eventually testators were enabled to institute or disinherit all grandchildren postumi sui, partly under a formula introduced by Gallus Aquilius, Cicero's colleague in the praetorship, Dig. 28. 2. 29 pr., partly under the lex Iunia Vellaea, A. D. 9, mentioned in § 2 inf., which, however, required all male postumi by descent to be disinherited nominatim, Gaius ii. 134 ; and partly on the authority of the jurist Salvius Julianus : see Poste's Gaius, pp. 236–7.

For those who were in postumorum loco by adrogation or adoption the law was not so simple. Gaius says (ii. 138–140) that a will was avoided by the subsequent adoption of a suus heres, even if the latter was instituted heir in it : but this doctrine was disputed by Scaevola (Dig. 28. 3. 18) and Papinian (Dig. 28. 2. 23. 1), whose view was adopted by Justinian. On the other hand, if an extraneus was disinherited in a will, and then was subsequently adopted or adrogated by the testator, the will was always avoided, Dig. 37. 4. 8. 8 (' exheredatio res in extraneo inepta est '). The

G. ii. 134. iura suorum heredum quasi adgnatione nanciscuntur. ne ergo eo modo rumpatur eius testamentum, sicut ipsum filium vel heredem instituere vel nominatim exheredare debet testator, ne non iure faciat testamentum, ita et nepotem neptemve ex filio necesse est ei vel heredem instituere vel exheredare, ne forte vivo eo filio mortuo, succedendo in locum eius nepos neptisve quasi adgnatione rumpant testamentum. idque lege Iunia Vellaea provisum est, in qua simul exheredationis modus

G. ii. 135. 3 ad similitudinem postumorum demonstratur. Emancipatos liberos iure civili neque heredes instituere neque exheredare necesse est, quia non sunt sui heredes. sed praetor omnes tam feminini quam masculini sexus, si heredes non instituantur, exheredari iubet, virilis sexus nominatim, feminini vero et inter ceteros. quodsi neque heredes instituti fuerint neque ita ut diximus exheredati, promittit praetor eis contra tabulas

G. ii. 136. 4 testamenti bonorum possessionem. Adoptivi liberi quamdiu sunt in potestate patris adoptivi, eiusdem iuris habentur, cuius sunt iustis nuptiis quaesiti: itaque heredes instituendi vel exheredandi sunt secundum ea quae de naturalibus exposuimus: emancipati vero a patre adoptivo neque iure civili neque quod ad edictum praetoris attinet inter liberos numerantur.

G. ii. 137. qua ratione accidit, ut ex diverso quod ad naturalem parentem attinet, quamdiu quidem sint in adoptiva familia, extraneorum numero habeantur, ut eos neque heredes instituere neque exheredare necesse sit: cum vero emancipati fuerint

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only exception to this was where a son who had been emancipated or given in adoption was disinherited, and subsequently adrogated or readopted by his own natural father, the testator, Dig. 28. 2. 23 pr. Probably the same rule applied to the postumus suus by legitimation.

If the son of a filiusfamilias who had made a will of castrense peculium was not therein instituted or disinherited, and then became suus heres by the grandfather's death, the will was avoided, Dig. 28. 2. 28. 1.

In Ulpian's time it was not established that all male postumi sui must be disinherited nominatim, though he says (Reg. 22. 22) that if one in a remoter degree than the first was disinherited inter ceteros, it was necessary to give him a legacy for the same reason alleged in this section in respect of postumae suae: but he adds, 'sed tutius est nominatim eos exheredari, et id observatur magis.'

§ 3. By liberi in this section is not meant all the testator's descendants, but only those who, had he died intestate, would have been entitled to succeed him by the clause in the edict 'unde liberi', see Bk. iii. 9. 3 and notes, inf.

ab adoptivo patre, tunc incipiant in ea causa esse, in qua futuri essent, si ab ipso naturali patre emancipati fuissent.
Sed haec vetustas introducebat. nostra vero constitutio inter 5
masculos et feminas in hoc iure nihil interesse existimans, quia utraque persona in hominum procreatione similiter naturae officio fungitur et lege antiqua duodecim tabularum omnes similiter ad successiones ab intestato vocabantur, quod et praetores postea secuti esse videntur, ideo simplex ac simile ius et in filiis et in filiabus et in ceteris descendentibus per virilem sexum personis non solum natis, sed etiam postumis introduxit, ut omnes, sive sui sive emancipati sunt, et nominatim exheredentur et eundem habeant effectum circa testamenta parentum suorum infirmanda et hereditatem auferendam, quem filii sui vel emancipati habent, sive iam nati sunt sive adhuc in utero constituti postea nati sunt. circa adoptivos autem certam induximus divisionem, quae constitutione nostra, quam super adoptivis tulimus, continetur. Sed si 6
expeditione occupatus miles testamentum faciat et liberos suos iam natos vel postumos nominatim non exheredaverit, sed silentio praeterierit non ignorans, an habeat liberos, silentium eius pro exheredatione nominatim facta valere constitutionibus principum cautum est. Mater vel avus maternus necesse non 7
habent liberos suos aut heredes instituere aut exheredare, sed

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§ 5. By the constitution to which he refers (Cod. 6. 28. 4) Justinian required all descendants, whom before it had been necessary to disinherit at all, to be in future either instituted, or disinherited nominatim. In default, if the pretermitted child was a suus, the will was void: if he was emancipated, he could only demand bonorum possessio contra tabulas. Children given in adoption had to be either instituted or disinherited unless the adoptio was plena (p. 138 supr.), Cod. 8. 48. 10 pr.

It is not clear what the words 'quod et praetores postea secuti esse videntur' refer to: perhaps to the bonorum possessio intestati, but more probably to the bonorum possessio contra tabulas immediately before the rescript of M. Aurelius, p. 258 supr.

§ 7. The 'adminiculum' referred to is the querella inofficiosi testamenti, for which see Tit. 18 inf.

Bonorum possessio contra tabulas, referred to in this Title, was granted, not only to pretermitted liberi who were entitled to bonorum possessio under liberi in case of intestacy, but also, under certain circumstances, (*a*) to the parens manumissor against the will of his emancipated son, Bk. i. 12. 6 supr., Dig. 37. 12.; (*b*) to a patron and his agnatic descendants against the will of his libertus (Bk. iii. 7 inf.) or liberta (Gaius i. 192,

possunt eos omittere. nam silentium matris aut avi materni ceterorumque per matrem ascendentium tantum facit, quantum exheredatio patris. neque enim matri filium filiamve neque avo materno nepotem neptemve ex filia, si eum eamve heredem non instituat, exheredare necesse est, sive de iure civili quaeramus, sive de edicto praetoris, quo praeteritis liberis contra tabulas bonorum possessionem promittit. sed aliud eis adminiculum servatur, quod paulo post vobis manifestum fiat.

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ii. 122, iii. 43–4); (*c*) to a patroness against the will of her liberta, Gaius iii. 52.

When granted to a descendant who was not disinherited by the ancestor in the form required by the Edict, its effect, if the praeteritus was a suus, was practically to substitute intestate succession for succession under the will; if not, its effect will appear more clearly from the following :—

(1) Upon the pretermitted child demanding bonorum possessio, other liberi praeteriti, and liberi who were instituted heirs in the will, came in with him under the grant (commisso per alium edicto), and thus the last might be largely benefited if the part in which they were instituted was less than their intestate portion, Dig. 37. 4. 8. 14: but they could not take advantage of the bonorum possessio if they had in any way accepted under the will. Liberi who were properly disinherited in the will could take nothing under it, i.e. the exheredations stand, even though the will is practically nullified, unless the will itself becomes void by being 'desertum'.

(2) The effect of bonorum possessio contra tabulas being not to substitute the ordinary rules of intestacy, but to make the deceased's bona divisible among such liberi as are not duly disinherited, later changes in the law of intestate succession (e.g. Nov. 118) have no influence here, and the nova clausula Iuliani (for which see Mr. Poste's note on Gaius ii. 135 and note on iii. 1. 9 inf.) applies.

(3) Certain portions of the will, if valid iure civili, still remain in force, viz. (*a*) the exheredations, Dig. 37. 4. 8 pr., ib. 10. 5; (*b*) the pupillary substitutions (Tit. 16 inf.) and appointments of testamentary guardians; (*c*) legacies and fideicommissa to coniunctae personae, i.e. ascendants and descendants of the testator, and praelegata dotis to the wife (Tit. 20. 15 inf.), or wife of a descendant, Dig. 37. 5. 1 pr. A constitution of A. Pius (Dig. 37. 5. 7) limited the amount of such dispositions by enacting that all the coniunctae personae together could not take more than each of the bonorum possessores.

XIV

DE HEREDIBUS INSTITUENDIS

Heredes instituere permissum est tam liberos homines quam servos tam proprios quam alienos. proprios autem olim quidem secundum plurium sententias non aliter quam cum libertate recte instituere licebat. hodie vero etiam sine libertate ex nostra constitutione heredes eos instituere permissum est. quod non per innovationem induximus, sed quoniam et aequius erat et Atilicino placuisse Paulus suis libris, quos tam ad Masurium Sabinum quam ad Plautium scripsit, refert. proprius autem servus etiam is intellegitur, in quo nudam proprietatem testator habet, alio usum fructum habente. est autem casus, in quo nec cum libertate utiliter servus a domina heres instituitur, ut constitutione divorum Severi et Antonini cavetur, cuius verba haec sunt: 'Servum adulterio maculatum non iure testamento manumissum ante sententiam ab ea muliere videri, quae rea fuerat eiusdem criminis postulata, rationis est: quare sequitur, ut in eundem a domina collata institutio nullius momenti habeatur.' alienus servus etiam is intellegitur, in quo usum fructum testator habet. Cf. G. ii. 185–7.

Tit. XIV. If a slave in whom another had a usufruct was manumitted by his owner, under the old law he remained a slave until the usufruct determined, Dig. 28. 5. 9. 20. By Justinian's constitution (Cod. 7. 15. 1 pr.) 'inter libertos proprietarii . . . quasi servus apud usufructuarium permaneat'.

The constitution of Severus and Antoninus here referred to had been in some degree suggested by the lex Iulia de adulteriis, which provided 'ne mulier intra sexagesimum divortii diem servos manumittat' Dig. 40. 9. 12–14. If manumitted under the circumstances of the text the act was not quite 'nullius momenti': he became statu liber, Dig. 40. 9. 13, and absolutely free if acquitted—maculatum meaning 'accusatum' (Dig. 28. 5. 48. 2: cf. Theoph. *ἔνοχον ὄντα τῇ μοιχείᾳ*).

The purpose of a will being the bestowal of the universal succession, the institution of the heir or heirs was regarded as of more importance than any other part—as in fact the only part which was in every case indispensable, 'quia testamenta vim ex institutione heredis accipiunt, ob id velut caput et fundamentum intellegitur totius testamenti heredis institutio' Gaius ii. 229: cf. Tit. 20. 34 inf. Hence, under the old law, no disposition could precede it in the will except exheredations (e.g. legacy or manumission); and the Sabinians even held that the appointment of a testamentary guardian ante heredis institutionem was void (Gaius ii.

G. ii. 188. 1 Servus autem a domino suo **heres institutus, si quidem in eadem causa** manserit, **fit ex testamento liber heresque necessarius. si vero** a vivo **testatore manumissus fuerit, suo arbitrio adire hereditatem potest**, quia non fit necessarius, cum utrumque ex domini testamento non consequitur. **quodsi alienatus fuerit, iussu novi domini adire hereditatem debet** et ea **ratione per eum dominus fit heres : nam ipse** alienatus **neque liber neque heres esse potest**, etiamsi cum libertate heres institutus fuerit; destitisse etenim a libertatis datione videtur dominus qui eum
G. ii. 189. alienavit. **alienus quoque servus heres institutus si in eadem causa duraverit, iussu domini adire hereditatem debet. si vero alienatus ab eo fuerit aut vivo testatore aut post mortem eius**

230–1). This was all changed by Justinian, Tit. 20. 34 inf., Bk. i. 14. 3 supr., Cod. 6. 23. 24.

Originally, too, solemn forms of institution were prescribed : 'heres institui recte potest his verbis : Titius heres esto, Titius heres sit, Titium heredem esse iubeo. Illa autem institutio ; heredem instituo, heredem facio, plerisque improbata est' Ulpian, Reg. 21. 1 ; cf. Gaius ii. 117. The necessity of using such formulae was first abolished by Constantine II, A.D. 339, 'quibus libet confecta sententiis, vel quolibet loquendi genere formata institutio valeat, si modo per eam liquebit voluntatis intentio' Cod. 6. 23. 15 ; even the name of the heir was unnecessary, if it was certain who was intended, Dig. 28. 5. 9. 8 ; cf. Tit. 20. 29 inf.

Some persons cannot be validly instituted at all : they lack testamenti factio. Others, though they can be validly instituted, can either take nothing at all as heirs, or at least the portion they can take is limited by law. Between these two classes there is an important difference. The will is void, if the person instituted lacks testamenti factio cum testatore (Ulpian, Reg. 22. 1) at the date either of the execution of the will, or of the testator's decease, or at which he ought to make aditio, Dig. 28. 5. 49. 1, Tit. 19. 4 inf. But where one of the second class was instituted, the will was never void on that ground alone, and capacity to take was required to exist only at the time when the benefit vested : 'non oportet prius de condicione cuiusquam quaeri, quam hereditas legatumve ad eum pertinet.'

Those who could not be validly instituted at all are (1) peregrini ; (2) intestabiles, i.e. persons who had acted as witnesses to some transaction, and then refused to give evidence of the fact, or denied that they had done so, Dig. 28. 1. 18. 1, Theoph. ad Inst. ii. 10. 6, though the incapacity of this class in Justinian's time has been doubted ; (3) heretics, Cod. 1. 5. 4, and apostates, Cod. 1. 7. 3 and 4 ; (4) children of persons convicted of treason, Cod. 9. 8. 5. 1 ; (5) children of and parties to unlawful marriages could not be instituted, the former by the parents, the latter by one another, Cod. 5. 5. 6 ; 5. 9. 6 ; (6) incertae personae, in particular

antequam adeat, **debet iussu novi domini adire.** at **si manumissus est** vivo testatore, vel mortuo antequam adeat, **suo**

(*a*) postumi; but the last relic of this rule, viz. that a postumus alienus could not be instituted heir or take a legacy was repealed by Justinian himself, Tit. 20. 28, Bk. iii. 9 pr. inf.: and (*b*) juristic persons, Ulpian, Reg. 22. 5. This restriction had, however, to a large extent been removed; the fiscus could be instituted heir, and so could municipal corporations (Cod. 6. 24. 12), churches and religious and charitable foundations (Cod. 1. 2. 1 and 23). Other corporations could acquire testamenti factio only by special grant from the emperor, Cod. 6. 24. 8; (7) the lex Voconia (see on Tit. 22 pr. inf.) had made all women except Vestal Virgins incapable of being instituted heirs to persons ranked in the highest class of the census as possessing 100,000 asses or upwards (Gaius ii. 274), though they might be legatees to the extent of half the property, Quintil. Declam. 264. This disqualification was quite obsolete under Justinian.

Among the enactments disabling certain classes from taking under a will either in whole or in part are the following:—

(1) By the lex Iunia Norbana Latini Iuniani were prohibited from taking either as heirs or as legatees, unless they acquired the civitas within 100 days, Gaius i. 23–4, ii. 110, 275, Ulpian, Rec. 17. 1.

(2) By a lex Iulia of Augustus, probably of 18 B.C., the coelebs (unmarried person) could take nothing under the will of one unrelated to him or her within the sixth degree as either heir or legatee, unless he or she married within 100 days next after hearing of the right. Certain classes were excepted on account of age, physical incapacity, etc., Ulpian, Reg. 17. 1.

(3) By the lex Papia Poppaea (see p. 149 supr.), the orbus (i.e. person who had been married but had no children living, Ulpian, Reg. 16. 1) could take under wills of persons outside the sixth degree only a moiety of what was given them. One child was sufficient to save a man from the statute, for ingenuae three, for libertae four were required. Here again there were exceptions on the ground of age and absence reipublicae causa.

(4) By the same statute, husband and wife who had no children by the marriage could take under one another's wills only a tenth of what was given them (lex decimaria), though the amount was increased by the existence of issue by a previous marriage, or if such issue had died. They were, however, entitled in addition to the usufruct of a third of the residue from which they were excluded. Portions which under these last two statutes could not be taken by those for whom they had been intended, became caduca, and went in the first instance to co-legatees with children, in the second, to instituted male heirs with children, in the third, to male legatees with children, and in default of all, to the treasury. These restrictions, however, no longer existed under Justinian, the penalties of coelibatus and orbitas having been abolished by the sons of Constantine, Cod. 8. 58. 1, and the lex decimaria repealed by Honorius and Theodosius, Cod. ib. 2.

2 **arbitrio adire hereditatem potest.** Servus alienus post domini mortem recte heres instituitur, quia et cum hereditariis servis est testamenti factio: nondum enim adita hereditas personae vicem sustinet, non heredis futuri, sed defuncti, cum et eius,
3 qui in utero est, servus recte heres instituitur. Servus plurium,

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(5) Domitian disqualified feminae probrosae from taking either the hereditas or legata, Dig. 29. 1. 41. 1, Cod. 5. 4. 23. 3. For other disabilities imposed on persons who married a second time, or on illegitimate while legitimate children were living, see Cod. 5. 9. 6 and 10, Nov. 22. 27 and 28, Nov. 89. 12, for a different case, Tit. 17. 8 inf. Finally, the hereditas or legata were sometimes 'erepta' from the person prima facie entitled on the ground of unworthiness (see Dig. 34. 9, Cod. 6. 35), the forfeiture being in favour sometimes of the fiscus, sometimes of other persons.

For the institution of servus proprius sine libertate see Gaius ii. 186, Bk. i. 6. 2 supr., Cod. 6. 27. 5.

§ 2. The opening words of this paragraph are ambiguous; they may refer to the institution of a slave actually at the time belonging to a hereditas iacens (Dig. 28. 5. 52, ib. 64), or to an institution not to take effect until the dominus of the slave instituted is dead, Theoph.

The institution of a servus alienus is at first sight enigmatical, for as he could acquire the inheritance only for his master, why not institute the latter at once? The solution is twofold. Firstly, the institution of the slave secured the transmission of the inheritance to the heirs of his master, whereas if the latter had been instituted himself and had predeceased the testator, the institution would have lapsed: and this could not be prevented by giving a 'remainder' to his heirs by substitution, for they were incertae personae; nemo est heres viventis. To guard against the contingency of the slave's own death in the lifetime of the testator, several slaves might be instituted by way of substitution. The other advantage of instituting a servus alienus will appear from a consideration of the difficulty of transferring an inheritance inter vivos. The maxim being semel heres semper heres, it was idle to talk of transferring the universitas iuris when a man had once actually become heir by aditio. But at an earlier moment it might have been possible; what was there to prevent one to whom a hereditas was delata, and who thus had the right of accepting, from transferring that right of acceptance to another? The aditio of an inheritance, however, was an actus legitimus, performable only by the actual person to whom it was delata, so that even where the person was a slave, who got nothing by aditio, he must accept himself; his master could not do it for him, and consequently the Romans refused consistently to admit any such assignment. To this general rule there are but very few exceptions, usually called 'cases of transmission', only one of which concerns us here. Gaius tells us (ii. 35) that when an inheritance was delata to an agnate under an intestacy, he could, in lieu of personally exercising his right of aditio, transfer it by in iure cessio to any one he pleased, and then 'perinde fit heres is cui in iure cesserit, ac si ipse per legem ad hereditatem vocatus

cum quibus testamenti factio est, ab extraneo institutus heres unicuique dominorum, cuius iussu adierit, pro portione dominii adquirit hereditatem.

Et unum hominem et plures in infinitum, quot quis velit, 4
heredes facere licet. Hereditas plerumque dividitur in duode- 5
cim uncias, quae assis appellatione continentur. habent autem et hae partes propria nomina ab uncia usque ad assem, ut puta haec: sextans, quadrans, triens, quincunx, semis, septunx, bes, dodrans, dextans, deunx, as. non autem utique duodecim uncias esse oportet. nam tot unciae assem efficiunt, quod testator voluerit, et si unum tantum quis ex semisse verbi

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esset'. But this was the only case in which such transfer was possible: and considering the Roman dislike of intestacy, and the subordinate position of agnates to sui, it must even in Gaius' time have been a very rare one.

If, however, A instituted C, the slave of B, on A's decease B could either actually become heir by directing C to make aditio, or he could get all the advantage derivable from the succession, without incurring the trouble of administration, by selling C at a price enhanced by his character of institutus: C then made aditio at the direction of the purchaser, who thereby became heres. If the first owner was reluctant to permanently part with his slave, he had only to bargain for his reconveyance by a covenant annexed to the sale.

Another clumsy expedient for effecting the same purpose was a sale of the inheritance by the heres after acceptance. This was no violation of the rule semel heres semper heres, because it did not produce a universal succession: the purchaser became owner of the deceased's tangible property only by traditio (Cod. 4. 39. 6), succeeded to his rights in personam only as cessionary (Dig. 18. 4. 2. 3 and 8), and became answerable for his debts only according to the ordinary rules of intercession. When, however, the inheritance was purchased from the fiscus, the vendee was a genuine universal successor, Cod. 4. 39. 1. For practical illustrations of such sales see Tit. 23 inf.

§ **5**. The rules stated in this and the three following sections for the division of an inheritance among two or more instituti may be summarised thus:—

(1) The hereditas is conceived as an as of twelve ounces, in fractions of which the heirs respectively are instituted or take: thus A may be instituted ex quincunce ($\frac{5}{12}$), and B ex septunce ($\frac{7}{12}$).

(2) If the testator specifies no shares, the coheirs take in equal shares, § 6, unless it is clear that he intended otherwise: e.g. 'Titius heres esto: Seius et Maevius heredes sunto: verum est quod Proculo placet, duos semisses esse, quorum alter coniunctim duobus datur' Dig. 28. 5. 59. 2.

(3) If he specifies the shares of one or some only, those to whom no

gratia heredem scripserit, totus as in semisse erit: neque enim idem ex parte testatus et ex parte intestatus decedere potest, nisi sit miles, cuius sola voluntas in testando spectatur. et e contrario potest quis in quantascumque voluerit plurimas
6 uncias suam hereditatem dividere. Si plures instituantur, ita demum partium distributio necessaria est, si nolit testator eos ex aequis partibus heredes esse: satis enim constat nullis partibus nominatis aequis ex partibus eos heredes esse. partibus autem in quorundam personis expressis, si quis alius sine parte nominatus erit, si quidem aliqua pars assi deerit, ex ea parte heres fit: et si plures sine parte scripti sunt, omnes in eadem parte concurrent. si vero totus as completus sit, in partem dimidiam vocatur et ille vel illi omnes in alteram dimidiam. nec interest, primus an medius an novissimus sine parte scriptus sit: ea enim pars data intellegitur quae vacat.
7 Videamus, si pars aliqua vacet nec tamen quisquam sine parte heres institutus sit, quid iuris sit? veluti si tres ex quartis partibus heredes scripti sunt. et constat vacantem partem singulis tacite pro hereditaria parte accedere et perinde haberi, ac si ex tertiis partibus heredes scripti essent: et ex diverso si plus in portionibus sit, tacite singulis decrescere, ut, si verbi gratia quattuor ex tertiis partibus heredes scripti sint, perinde habeantur, ac si unusquisque ex quarta parte scriptus fuisset.

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shares are specifically assigned take in equal proportions the difference between the sum of the shares assigned and the aggregate of $\frac{12}{12}$ (e.g. A heres ex sextante ($\frac{1}{6}$), B heres ex quincunce ($\frac{5}{12}$); C, the heir to whom no share is assigned, takes ex quincunce as well). If, however, the sum of the share assigned exceeds $\frac{12}{12}$, then the heirs whose shares are not specified take the difference between it and $\frac{24}{12}$, and, if this is exceeded, $\frac{36}{12}$ and so on, §§ 6 and 8.

(4) If he specifies shares for each and all of the heirs, which, however, do not together make up the number 12 or any multiple of 12, their shares are rateably increased until 12 or its next multiple is reached: conversely, if he gives away more than the as in fractions among all the heirs, their shares are rateably diminished, § 7.

It should be observed in addition that if it is clear that the testator's intention, in giving the instituted heirs less than the whole as, was to limit them, and if it is certain to whom he meant the residue to go, they or one of them can be compelled to convey it to him as a fideicommissum; and where a testator institutes one of two heirs ex asse, and the other in a fraction, the will is to be interpreted, as a rule, as if no definite share had been assigned to the first at all, Cod. 6. 37. 23. pr.

Et si plures unciae quam duodecim distributae sunt, is, qui 8 sine parte institutus est, quod dipondio deest habebit: idemque erit, si dipondius expletus sit. quae omnes partes ad assem postea revocantur, quamvis sint plurium unciarum.

Heres et pure et sub condicione institui potest. ex certo 9 tempore aut ad certum tempus non potest, veluti 'post quinquennium quam moriar' vel 'ex kalendis illis' aut 'usque ad kalendas illas heres esto': diemque adiectum pro supervacuo haberi placet et perinde esse, ac si pure heres institutus esset. Impossibilis condicio in institutionibus et legatis nec non in 10

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§ 9. For condicio and dies in general see pp. 161–163 supr. An exheredation could not be made subject to a condition unless the child were instituted in the contrary event, Dig. 28. 2. 3. 1; 37. 4. 18 pr.

The institution of an heir ex tempore or ad tempus (i.e. ex die or in diem), or subject to a resolutive condition, would violate the maxim semel heres semper heres, and such qualifications were accordingly taken pro non scriptis, Dig. 28. 5. 34, ib. 88, except in soldiers' wills, in which the effect of a dies ex quo was delation, until the arrival of the dies, to the intestate heirs, Dig. 29. 1. 41 pr. A dies incertus ex quo in a will was deemed a condition, and did not invalidate the disposition, Dig. 35. 1. 75. The effect of a dies in quem, or of the fulfilment of a resolutive condition, was to shift the hereditas on to the substitutus, or, if there were none, to the heredes ab intestato.

Thus the only condition upon which an ordinary institution can be made to depend is a suspensive one. The effect of this was, strictly, to postpone delatio to the institutus till the condition was fulfilled, Dig. 29. 2. 69: but the opinion of Mucius Scaevola was gradually recognised as law, that a person instituted under a condicio non faciendi practically fulfils the condition, and becomes at once entitled to the inheritance, by giving security that if he breaks the condition he will transfer the estate to those entitled next after him (cautio Muciana, Dig. 35. 1. 7). And even any one conditionally instituted could, before the fulfilment of the condition, obtain provisional bonorum possessio from the praetor by giving the same security, Dig. 37. 11. 5 pr.; 2. 8. 12. If he did not avail himself of this privilege, and the condition was one whose fulfilment was entirely within his own control (e.g. si servum suum manumiserit), the creditors of the estate could get a limit of time fixed within which he must fulfil the condition or forfeit his right, Dig. 28. 5. 23. 1: if the condition was not of this kind (e.g. si Titius consul factus erit) the creditors could obtain a grant of possessio of the inheritance, and pay themselves from the proceeds of its sale, Dig. ib. 23. 2.

10. Impossible conditions are those which cannot be fulfilled either (1) on natural grounds (physically impossible, e.g. Bk. iii. 19. 11), or (2) on jural grounds ('veluti sororem nupturam sibi aliquis stipulatur'

11 fideicommissis et libertatibus pro non scripto habetur. Si plures condiciones institutioni adscriptae sunt, si quidem coniunctim, ut puta 'si illud et illud factum erit', omnibus parendum est: si separatim, veluti 'si illud aut illud factum erit', cuilibet obtemperare satis est.

12 Hi, quos numquam testator vidit, heredes institui possunt. veluti si fratris filios peregri natos ignorans qui essent heredes instituerit: ignorantia enim testantis inutilem institutionem non facit.

XV

DE VULGARI SUBSTITUTIONE

G. ii. 174. Potest autem quis in testamento suo **plures gradus heredum facere**, ut puta 'si ille heres non erit, ille heres esto': **et deinceps in quantum velit testator substituere potest** et

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Dig. 45. 1. 35. 1): turpes (immoral) condiciones are treated in the same way as those which cannot legally be performed, Dig. 28. 7. 15. A further distinction is that between conditions which are absolutely or objectively impossible, and those which are only relatively impossible; by the latter being meant such as might have been performed under other circumstances, but which under existing circumstances cannot: e.g. release of a non-existent debt, or manumission of a slave who is dead. Between these, however, and those which are objectively impossible there is, in general, no difference of treatment or effect: Savigny, System iii. p. 165. A contract made subject to an impossible condition was void, Bk. iii. 19. 11 inf.: the Proculians had maintained the same of testamentary dispositions, but the Sabinians held that an impossible condition in a will ought to be taken pro non scripto, though Gaius himself (iii. 98) admitted the unreasonableness of the distinction between wills and contracts, which nevertheless was confirmed by Justinian. A condition whose fulfilment becomes impossible only after the making of the will does not come within the rule, Dig. 9. 2. 23. 2.

Tit. XV. Substitutions bear some resemblance to the remainders of English law. They were dictated partly, no doubt, by the natural desire to be succeeded by a number of persons, not collectively, but in subordination to one another; A (e. g.) being preferred to B, but if A could or would not take the inheritance, then B being preferred to C, and so on: but they were due still more, as is suggested by the concluding words of the opening section, and as appears even more clearly from the next Title, to the Roman dislike of intestacy. A substitution, as may be seen from the form given in the text, is in effect a conditional institution: conditional either on another and earlier named institutus not taking the inheritance (Tit. 15), or, not only on this, but also on his taking and dying before he is old enough to make a will for himself (pupillary substitution,

novissimo loco in subsidium vel servum necessarium heredem instituere. Et **plures in unius locum** possunt substitui, vel 1 G. ii. 175.
unus in plurium, vel singuli singulis, vel invicem ipsi qui heredes instituti sunt. Et si ex disparibus partibus heredes 2
scriptos invicem substituerit et nullam mentionem in substitutione habuerit partium, eas videtur partes in substitutione dedisse, quas in institutione expressit: et ita divus Pius rescripsit. Sed si instituto heredi et coheredi suo substituto 3
dato alius substitutus fuerit, divi Severus et Antoninus sine distinctione rescripserunt ad utramque partem substitutum admitti. Si servum alienum quis patrem familias arbitratus 4
heredem scripserit et, si heres non esset, Maevium ei substituerit isque servus iussu domini adierit hereditatem, Maevius in partem admittitur. illa enim verba 'si heres non erit' in eo quidem, quem alieno iuri subiectum esse testator scit, sic accipiuntur: si neque ipse heres erit neque alium heredem effecerit: in eo vero, quem patrem familias esse arbitratur,

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Tit. 16). The modes in which the condition might be fulfilled, and the substitution take effect, were (1) the institutus dying before the testator: (2) his failing to comply with the testator's directions, e.g. as to the time within which he must accept: (3) his refusal to accept, or (4) disability of being instituted or inability to take.

§ 1. When several joint instituti were reciprocally substituted each to one another, any one of them who made aditio thereby also acquired iure hereditario his share in the portion of any other who failed from any reason to take, which he could not refuse; and any one of them who refused to make aditio as institutus could claim nothing as substitutus.

§ 3. This is expressed by the maxim substitutus substituto est substitutus instituto, which can be broken up into two quite different propositions: (1) if B is substituted to A, and C to B, and B predeceases C, the latter is entitled to A's share si heres non erit: (2) if of two coheirs, A and B, B is substituted to A, and C, an extraneus, is substituted to B, then C, if A and B both drop out, gets B's share not only as substitutus, but also as institutus.

For the question whether a vulgar was implied in a pupillary substitution see Mr. Poste's note on Gaius ii. 179. M. Aurelius enacted that each should be implied in the other: 'iam hoc iure utimur ex D. Marci et Severi constitutione, ut quum pater impuberi filio in alterum casum substituisset, in utrumque casum substituisse intellegatur, sive filius heres non extiterit, sive extiterit et impubes decesserit' Dig. 28. 6. 4 pr.

§ 4. If it could be proved that the testator would not have instituted the alienus servus, had he known his actual condition, the institution was void, and the substitute took all, Cod. 6. 24. 3.

illud significant: si hereditatem sibi eive, cuius iuri postea subiectus esse coeperit, non adquisierit. idque Tiberius Caesar in persona Parthenii servi sui constituit.

XVI

DE PUPILLARI SUBSTITUTIONE

G. ii. 179. **Liberis suis impuberibus, quos in potestate quis habet, non solum ita ut supra diximus substituere potest, id est ut, si heredes ei non extiterint, alius ei sit heres, sed eo amplius ut et, si heredes ei extiterint et adhuc impuberes mortui fuerint, sit eis aliquis heres. veluti** si quis dicat **hoc modo: 'Titius filius meus heres mihi esto: si filius meus heres mihi non erit, sive**

Tit. XVI. Substitutio pupillaris, like the right of appointing testamentary guardians to one's own filiifamilias under the age of puberty, was a pure outcome of patria potestas, and, as Justinian tells us here, an institution of customary law. Where a paterfamilias instituted a child under the age of puberty and in his immediate power (or one not yet born, postumus, § 4 inf., Dig. 28. 6. 2 pr.) as his heir, he could substitute to the latter so as to meet not only the event of his predeceasing him himself, and so not becoming heir at all, but also that of his becoming heir, and then dying before he reached puberty: and even if he disinherited the child, he could appoint a substitutus to him in the event of his dying impubes, to take any property which he might himself acquire between his becoming sui iuris and his death. The object of the practice in either case was clearly to save the child from dying intestate: not being able, *ex hypothesi*, to make a valid will for himself, his paterfamilias was allowed to make one for him, § 2, which became void eo instanti that he himself acquired testamentary capacity, § 8. The differences between this and vulgar substitution are clear at a glance. The latter operates only if the institutus fails to take the inheritance: if he once accepts, the contingent right of the substitutus falls to the ground. But pupillary substitution is not necessarily made to an institutus at all: it may be made to a disinherited child; and even if the child as a fact is instituted, and actually takes the inheritance, the substitution may still operate, and will, if the heir dies under the age of puberty.

If the pupillariter substitutus was himself instituted, jointly with the child, to the inheritance and refused it, he could not take under the substitution: conversely, his acceptance of it was an implicit acceptance of the child's inheritance in case he became entitled, Dig. 28. 6. 10. 2 and 3, Cod. 6. 30. 20. 1.

A pupillary substitution became void not only on the child's attaining puberty, but also by his dying or otherwise passing out of potestas during the father's lifetime, and by his falling on the pater's death under the

heres erit et prius moriatur, quam in suam tutelam venerit (id est pubes factus sit), **tunc Seius heres esto.' quo casu si** G. ii. 180. **quidem non extiterit heres filius, tunc substitutus patri fit heres: si vero extiterit heres filius et ante pubertatem decesserit, ipsi filio fit heres substitutus.** nam moribus institutum est, ut, cum eius aetatis sunt, in qua ipsi sibi testamentum facere non possunt, parentes eis faciant. Qua ratione excitati **1**
etiam constitutionem in nostro posuimus codice, qua prospectum est, ut, si mente captos habeant filios vel nepotes vel pronepotes cuiuscumque sexus vel gradus, liceat eis, etsi puberes sint, ad exemplum pupillaris substitutionis certas personas substituere: sin autem resipuerint, eandem substitutionem infirmari, et hoc ad exemplum pupillaris substitutionis, quae postquam pupillus adoleverit infirmatur. Igitur in pu- **2**
pillari substitutione secundum praefatum modum ordinata **duo quodammodo sunt testamenta, alterum patris, alterum filii, tamquam si ipse filius sibi heredem instituisset: aut certe**

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potestas of another, though not by his subsequent adrogation, Dig. 1. 7. 17. 1.

§ **1**. This quasi pupillaris or exemplaris substitutio, as it is commonly called, was, as a general right, a new creation of Justinian, and was quite independent of patria potestas, being allowed to ascendants of either sex, Cod. 6. 26. 9, provided they left to the lunatic or idiot child the legitima portio (Tit. 18 inf.). It is doubtful whether they might make a will of this legitima portio only, or of the child's whole property: and in their choice of a successor to the mente captus they were limited, in the first instance, to descendants of the latter, in the second, to descendants of their own; in default of both they might select whom they pleased: this is the meaning of 'certas personas' in the text. In general the rules of substitutio pupillaris applied. By special permission from the emperor a father might name an heir for a child who was on other grounds disabled from making a will for himself, but such appointment became void if the incapacity ceased, or the child had a suus heres born to him, Dig. 28. 6. 43 pr.

§ **2**. In pr. the substitutus is said to become heir to the child, and so too in Gaius ii. 180; earlier he seems rather to have been regarded as successor to the father, 'si mihi filius gignitur, isque prius moritur [quam in suam tutelam veniat, sc.] tum ut mihi ille sit heres' Cic. de Orat. 2. 32, 'non filio, sed sibi' de Invent. 2. 21; cf. Dig. 37. 11. 8. 1.

The pupillary substitution, as appears from § 3 inf., might be contained in a separate instrument, or even in a separate will, Dig. 28. 6. 16. 1, ib. 20. 1, though in the latter case the pater's will must be made

unum est testamentum duarum causarum, id est duarum **here-**
3 **ditatum.** Sin autem quis ita formidolosus sit, ut timeret, **ne**
G. ii. 181. **filius** eius **pupillus** adhuc ex eo, quod palam substitutum
accepit, **post obitum** eius **periculo insidiarum subiceretur: vulgarem quidem substitutionem palam facere** et in primis testamenti partibus debet, **illam autem substitutionem, per quam et si heres extiterit pupillus et intra pubertatem decesserit substitutus vocatur, separatim in inferioribus partibus scribere eamque partem proprio lino propriaque cera consignare et in priore parte testamenti cavere, ne inferiores tabulae vivo filio** et **adhuc impubere aperiantur.** illud palam est non ideo minus valere substitutionem impuberis filii, quod in isdem tabulis scripta sit, quibus sibi quisque heredem instituisset,
G. ii. 182. 4 quamvis hoc pupillo periculosum sit. **Non solum autem**
heredibus institutis impuberibus liberis ita substituere parentes possunt, ut et **si** heredes eis extiterint et **ante pubertatem mortui fuerint, sit eis heres is quem ipsi voluerint, sed etiam exheredatis. itaque eo casu si quid pupillo ex hereditatibus legatisve aut donationibus propinquorum** atque amicorum
G. ii. 183. **adquisitum fuerit, id omne ad substitutum pertineat. quaecumque diximus de substitutione impuberum liberorum vel heredum institutorum vel exheredatorum, eadem etiam de**
5 **postumis intellegimus.** Liberis autem suis testamentum facere nemo potest, nisi et sibi faciat: nam pupillare testamentum pars et sequela est paterni testamenti, adeo ut, si patris testa-
6 mentum non valeat, ne filii quidem valebit. Vel singulis autem liberis vel qui eorum novissimus impubes morietur substitui potest. singulis quidem, si neminem eorum intestato decedere voluit: novissimo, si ius legitimarum hereditatium
7 integrum inter eos custodiri velit. Substituitur autem impuberi aut nominatim, veluti 'Titius', aut generaliter 'quisquis

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first, Dig. ib. 2. 4: it was, however, always regarded as a mere appendage of the latter, with which it stood or fell, § 5 inf., Dig. 28. 6. 10. 4.

§ 3. Gaius observes (ii. 181) that it was far safer to make both substitutions in separate instruments, 'quod ex priore [substitutione] potest intellegi in altera quoque idem esse substitutus.' For illustrations of the danger referred to see Cic. pro Cluent. 11. 32, Horace, Sat. 2. 5. 49, Persius, Sat. 2. 12. 13, Suetonius, Galba 9, Dig. 27. 2. 1. 1.

§ 4. The right of substituting to disinherited children was doubtful in the time of Cicero, de Invent. 2. 21.

mihi heres erit': quibus verbis vocantur ex substitutione impubere filio mortuo, qui et scripti sunt heredes et extiterunt, et pro qua parte heredes facti sunt. Masculo igitur usque ad 8
quattuordecim annos substitui potest, feminae usque ad duodecim annos: et si hoc tempus excesserit, substitutio evanescit.
Extraneo vero vel filio puberi **heredi instituto ita substituere** 9 G. ii. 184.
nemo potest, ut, si heres extiterit et intra aliquod tempus decesserit, alius ei sit heres: sed hoc solum permissum est, ut eum per fideicommissum testator obliget alii hereditatem eius vel totam vel pro parte restituere: quod ius quale sit, suo loco trademus.

XVII

QUIBUS MODIS TESTAMENTA INFIRMANTUR

Testamentum iure factum usque eo valet, donec rumpatur irritumve fiat. Rumpitur autem testamentum, cum in eodem 1
statu manente testatore ipsius testamenti ius vitiatur. **si quis** G. ii. 138.
enim **post factum testamentum adoptaverit sibi filium** per im-

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§ 9. As is said in the text, the power of a testator to control the devolution of property after his own decease depended on the operation of fideicommissa (Tit. 23 inf.). Apparently he could not control or tie up the 'hereditas' for more than two lives, viz. those of the instituted impubes filius and of the pupillariter substitutus. But it would seem that the devolution of specific property might be prescribed for an unlimited period by imposing on each successive recipient a charge to bequeath it to the next, at any rate for the purpose of keeping it in a particular family: Dig. 30. 114. 14–18: 31. 32. 6: ib. 67 pr.—7: ib. 69. 1. 3. 4: see Arndts, Pandekten, § 549. By Nov. 159. c. 2 it was enacted that the fourth holder should be discharged from the trust: but in the modern civil law this is not binding: Wächter, Pandekten, § 316, note 6.

Tit. XVII. For the modes in which a will might be or become void see Bk. iii. 1 pr. inf. A will which was void ab initio was said to be iniustum or non iure factum; this might occur (1) through want of testamenti factio in the testator at the time of its execution, p. 254 supr.; (2) through defect of form, pp. 246–251 supr.; (3) through defect in the institution, especially praeterition of a suus heres, pp. 256 sqq. supr., and institution of a person who has not testamenti factio passiva, p. 264 supr., Dig. 28. 5. 49. 1.

§ 1. The subsequent birth (agnatio) of a postumus suus avoided a previously executed will, unless the postumus was by anticipation instituted or disinherited; but, as is observed on Tit. 13. 1 supr., certain postumi by quasi-agnatio could never be disinherited so as to save the

peratorem **eum, qui sui iuris est, aut per praetorem** secundum nostram constitutionem **eum, qui in potestate parentis fuerit, testamentum eius rumpitur quasi adgnatione sui heredis.**

G. ii. 144. **2 Posteriore quoque testamento, quod iure perfectum est, superius rumpitur. nec interest, an extiterit aliquis heres ex eo, an non extiterit: hoc enim solum spectatur, an** aliquo casu **existere potuerit. ideoque si quis aut noluerit heres esse, aut vivo testatore aut post mortem eius antequam hereditatem adiret decesserit, aut condicione, sub qua heres institutus est, defectus sit, in his casibus pater familias intestatus moritur: nam et prius testamentum non valet ruptum a posteriore et posterius aeque nullas vires habet, cum ex eo nemo heres**

3 extiterit. Sed si quis priore testamento iure perfecto poste-

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will. Adoptio minus plena did not avoid a will previously executed by the adoptans, for the adopted child did not come under his potestas.

§ 2. A later valid will revoked an earlier one, even though the testator had, by the latter or any other declaration, proclaimed any subsequent testamentary disposition of his own void: and even a statement in the first that it should be revoked by a later one only if executed in a special form, was altogether ineffectual for the purpose contemplated, for 'ambulatoria est voluntas . . . usque ad vitae supremum exitum' Dig. 24. 1. 32. 3.

One exception, however, to the rule, that the second will, to revoke the first, must be valid iure civili, is stated by Ulpian in Dig. 28. 3. 2: 'tunc autem prius testamentum rumpitur, quum posterius rite perfectum est, nisi forte posterius vel iure militari sit factum, vel in eo scriptus est, qui ab intestato venire potest: tunc enim et posteriore non perfecto superius rumpitur,' i.e. a prior valid will is revoked by a later invalid one, if the intestate heirs of the deceased are passed over in the first and instituted in the second, cf. Cod. 6. 23. 21. 5. Conversely, as appears from § 3, the institutus would be bound by the provisions of an earlier will which the later one had revoked, if the dispositions of that in which he was instituted could be read as imposing on him a fideicommissum tacitum. Such an inference is there drawn from the fact that he was instituted to res certae only: though, if those res certae did not amount to as much, he might retain enough in addition as would make up the clear fourth of the inheritance to which he was entitled under the SC. Pegasianum (not the lex Falcidia, as is erroneously stated in the text).

Besides the two modes mentioned in §§ 1 and 2, a will might be ruptum (*a*) as described in § 7 inf.; (*b*) by an oral or otherwise informal declaration of revocation, if made before three witnesses, or registered in the acta, and at least ten years since the execution of the will, Cod. 6. 23. 27. 2.

rius aeque iure fecerit, etiamsi ex certis rebus in eo heredem instituerit, superius testamentum sublatum esse divi Severus et Antoninus rescripserunt. cuius constitutionis inseri verba iussimus, cum aliud quoque praeterea in ea constitutione expressum est. 'Imperatores Severus et Antoninus Cocceio Campano. Testamentum secundo loco factum, licet in eo certarum rerum heres scriptus sit, iure valere, perinde ac si rerum mentio facta non esset, sed teneri heredem scriptum, ut contentus rebus sibi datis aut suppleta quarta ex lege Falcidia hereditatem restituat his, qui in priore testamento scripti fuerant, propter inserta verba secundo testamento, quibus ut valeret prius testamentum expressum est, dubitari non oportet.' et ruptum quidem testamentum hoc modo efficitur.
Alio quoque modo testamenta iure facta infirmantur, veluti 4 G. ii. 145.
cum is qui fecerit testamentum capite deminutus sit. quod
quibus modis accidit, primo libro rettulimus. Hoc autem 5 G. ii. 146.
casu irrita fieri testamenta dicuntur, cum alioquin et quae rumpuntur irrita fiant et quae statim ab initio non iure fiunt irrita sunt: et ea, quae iure facta sunt, postea propter capitis deminutionem irrita fiunt, possumus nihilo minus rupta dicere. sed quia sane commodius erat singulas causas singulis appellationibus distingui, ideo quaedam non iure facta dicuntur,
quaedam iure facta rumpi vel irrita fieri. Non tamen per 6 G. ii. 147.
omnia inutilia sunt ea testamenta, quae ab initio iure facta

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§ 4. Capitis deminutio is only an instance of a will becoming irritum (veluti); another would be that of a soldier's will avoided at the end of a year after his discharge, Dig. 28. 3. 7.

§ 6. The only kind of capitis deminutio whose effect, in making the will irritum, could be overridden in this manner by bonorum possessio secundum tabulas was capitis deminutio minima. The bonorum possessio was sine re, i. e. could always be practically defeated by the civil heirs ab intestato of the deceased, if there were such (Gaius ii. 148, 9, Ulpian, Reg. 23. 6), unless the testator, after recovering testamenti factio, expressly declared his desire that the will should stand, Dig. 37. 11. 11. 2. If the capitis deminutio resulted from capture in war, the will was not irritum, being upheld either iure postliminii or by the fictio legis Corneliae, see on Tit. 12. 5 supr.

Bonorum possessio secundum tabulas usually found its application where there was a will which iure civili was void, but which satisfied the praetorian requirements; cases of this, besides that in the text, and the praetorian will mentioned p. 246 supr. are (1) pretermission of a suus

propter capitis deminutionem **irrita facta sunt. nam si septem testium signis signata sunt, potest scriptus heres secundum tabulas testamenti bonorum possessionem agnoscere, si modo defunctus et civis Romanus et suae potestatis mortis tempore fuerit: nam si ideo irritum factum sit testamentum, quod civitatem vel etiam libertatem testator amisit, aut quia in adoptionem se dedit et mortis tempore in adoptivi patris potestate sit, non potest scriptus heres secundum tabulas**
7 **bonorum possessionem petere.** Ex eo autem solo non potest infirmari testamentum, quod postea testator id noluit valere: usque adeo ut et, si quis post factum prius testamentum posterius facere coeperit et aut mortalitate praeventus, aut quia eum eius rei paenituit, id non perfecisset, divi Pertinacis oratione cautum est, ne alias tabulae priores iure factae irritae fiant, nisi sequentes iure ordinatae et perfectae fuerint. nam
8 imperfectum testamentum sine dubio nullum est. Eadem oratione expressit non admissurum se hereditatem eius, qui

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heres, though the bonorum possessio was sine re, unless the suus predeceased the testator or abstained from the inheritance, Dig. 28. 3. 12 pr., ib. 17. (2) If a later will became void, bonorum possessio would be granted secundum tabulas prioris testamenti, Dig. 37. 11. 11. 2. (3) If there were two or more wills, none of which could be proved to be the most recent, they would be read together as one (praetorian) testament, Dig. 37. 11. 1. 6: for a case obsolete under Justinian see Gaius ii. 118–122. (4) Where the instituted heir was a postumus alienus, Bk. iii. 9 pr. inf.: note on Tit. 20. 28 inf.

A will might become void, not only by being ruptum or irritum, but also (1) by being desertum, i.e. by the failure of all instituted heirs to take, whether from refusal, from predeceasing the testator, or from want of testamenti factio between delatio and aditio (Tit. 19. 4 inf.); and (2) by being successfully impeached on the ground of inofficiositas, as described in the next Title.

§ 7. For 'oratio' see p. 103 supr., and for the enactment of Pertinax cf. Capitol. Pert. 7 'legem . . . tulit, ut testamenta priora non prius essent irrita, quam alia perfecta essent, neve ob hoc fiscus aliquando succederet'. To cancel a written will otherwise than by the execution of a later one it was necessary to destroy the instrument by tearing or cutting it, or by erasing the institution, though unintentional erasure after execution did not affect the validity of its dispositions if their tenor was known, Dig. 28. 4. 1. 2. Single dispositions could similarly be revoked by erasure, without affecting the validity of the will as a whole, Dig. ib. 2.

§ 8. Cf. Paulus, Sent. Rec. 5. 12. 8 (in Dig. 28. 5. 9. 1) 'imperatorem litis causa heredem institui invidiosum est, nec calumniae facultatem ex

litis causa principem heredem reliquerit, neque tabulas non legitime factas, in quibus ipse ob eam causam heres institutus erat, probaturum neque ex nuda voce heredis nomen admissurum neque ex ulla scriptura, cui iuris auctoritas desit, aliquid adepturum. secundum haec divi quoque Severus et Antoninus saepissime rescripserunt : 'licet enim' inquiunt 'legibus soluti sumus, attamen legibus vivimus.'

XVIII

DE INOFFICIOSO TESTAMENTO

Quia plerumque parentes sine causa liberos suos vel exheredant vel omittunt, inductum est, ut de inofficioso testamento agere possint liberi, qui queruntur aut inique se exheredatos aut inique praeteritos, hoc colore, quasi non sanae mentis fuerunt, cum testamentum ordinarent. sed hoc dicitur, non quasi vere furiosus sit, sed recte quidem fecit testamentum, non autem ex officio pietatis : nam si vere furiosus est, nullum est testamentum. Non tantum autem liberis permis- 1

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principali maiestate capi oportet'. For acceptance under informal wills by the Emperors cf. Suetonius, Calig. 38, Domit. 12, Pliny, Paneg. 43. 'Nuda vox' seems to mean the allegation of having heard so and so declare informally that he had made the emperor his heir ('qui diceret audisse se ex defuncto, cum viveret, heredem sibi Caesarem esse' Suetonius, l. c.).

Tit. XVIII. The practice of exheredation formally enabled a father to debar his children from all share in his succession; in this Title is described the remedy for too harsh an exercise of this privilege, which practically secured to the nearest relations within a certain degree of every testator a fixed proportion of his or her property. The persons to whom this right of impeaching a will as inofficiosum belonged are specified in §§ 1 and 2, and the circumstances under which it could be exercised in § 3. The querella, or action for the rescission of the will, had to be brought within five years of the testator's decease: its ordinary effect was to avoid it in toto, and to substitute succession ab intestato, Dig. 5. 2. 8. 16, ib. 13, though it might be brought against one or some only of several joint heirs, in which case the will was upset only in part, the testator remaining pro parte testatus, Dig. 5. 2. 19. 24. For the plea upon which the will was avoided (quasi non sanae mentis) cf. Val. Max. 7. 8. 1, Seneca, Clement. 1. 14, Dio Cassius 59. 1, Pliny, Paneg. 43: it seems to have been suggested by Greek practice (the δίκη μανίας): Schulin, Das griechische Testament, p. 16.

§ 1. Descendants could bring the querella against the wills of ascendants

sum est parentum testamentum inofficiosum accusare, verum etiam parentibus liberorum. soror autem et frater turpibus personis scriptis heredibus ex sacris constitutionibus praelati sunt: non ergo contra omnes heredes agere possunt. ultra fratres et sorores cognati nullo modo aut agere possunt aut
2 agentes vincere. Tam autem naturales liberi, quam secundum nostrae constitutionis divisionem adoptati ita demum de inofficioso testamento agere possunt, si nullo alio iure ad bona defuncti venire possunt. nam qui alio iure veniunt ad totam hereditatem vel partem eius, de inofficioso agere non possunt. postumi quoque, qui nullo alio iure venire possunt, de
3 inofficioso agere possunt. Sed haec ita accipienda sunt, si nihil eis penitus a testatoribus testamento relictum est. quod nostra constitutio ad verecundiam naturae introduxit. sin vero

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('exheredant . . . omittunt' in pr. indicating respectively ascendants exercising potestas and all other ascendants, female as well as male) and vice versa, if, supposing the testator had died intestate, they would have been the heirs, civil or praetorian, Dig. 5. 2. 6. 2: ib. 7: ib. 8 pr. As to the rights of brothers and sisters against one another, Ulpian writes 'omnibus enim tam parentibus quam liberis de inofficioso licet disputare: cognati enim proprii qui sunt ultra fratrem melius facerent si se sumptibus inanibus non vexarent, cum obtinere spem non haberent' Dig. 5. 2. 1. Constantine enacted that only agnatic brothers and sisters should be entitled to bring the querella; Justinian extended it to germani, but excluded uterini, and repealed the requirement of agnatic connection, Cod. 3. 28. 27, though still allowing the action only where turpes personae were preferred ('si scripti heredes infamiae vel turpitudinis vel levis notae macula adsparguntur').

§ 2. The plene adoptatus alone (unless emancipated before the testator's death) could impeach his adoptive father's will, Cod. 8. 48. 10 pr.: the minus plene adoptatus retained the right against his natural father. As is remarked in the text, the action was barred if the claimant could obtain his due alio iure, e. g. by bonorum possessio contra tabulas, if he were an emancipated son and praeteritus, or by the quarta Antonina, if, having been adrogated as impubes, he was subsequently disinherited; see Bk. i. 11. 3 supr.

§ 3. Before Justinian the querella lay whenever the claimant had received less from the testator than he was entitled to by law: 'si parum quam ei debebatur, fuerit consecutus, movere de inofficioso testamento querellam concedatur' Nov. Theod. 1. 22. He, however, enacted (Cod. 3. 28. 30–36) that in future the sole ground for the action should be that the claimant had received nothing at all: if he had received something, though ever so little, his sole remedy was to bring the new action ad supplendam legitimam against the heir or heirs, which left the will

quantacumque pars hereditatis vel res eis fuerit relicta, de inofficioso querella quiescente id quod eis deest usque ad quartam legitimae partis repletur, licet non fuerit adiectum boni viri arbitratu debere eam repleri. Si tutor nomine pupilli, cuius 4
tutelam gerebat, ex testamento patris sui legatum acceperit, cum nihil erat ipsi tutori relictum a patre suo, nihilo minus possit nomine suo de inofficioso patris testamento agere. Sed et si e 5
contrario pupilli nomine, cui nihil relictum fuerit, de inofficioso egerit et superatus est, ipse quod sibi in eodem testamento legatum relictum est non amittit. Igitur quartam quis debet 6
habere, ut de inofficioso testamento agere non possit: sive iure hereditario sive iure legati vel fideicommissi, vel si mortis causa ei quarta donata fuerit, vel inter vivos in his tantummodo casibus, quorum nostra constitutio mentionem facit, vel aliis modis qui constitutionibus continentur. Quod autem de 7
quarta diximus, ita intellegendum est, ut, sive unus fuerit sive

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untouched: for precedents for this rule cf. Paul. Sent. Rec. 4. 5. 10, Cod. 3. 28. 4. The share which one could demand was one-fourth of what one would have had if the testator had died intestate, Dig. 5. 2. 8. 8. Justinian subsequently enacted, by Nov. 18. 1, that if a man had less than five children he must leave them together, in equal shares, at least a third of the inheritance; if five or more, at least one-half.

§ 4. Acceptance of anything, with full knowledge, under the will was taken to imply acquiescence in its dispositions, and so barred the querella, Dig. 34. 9. 5 pr.; a rule sometimes so strictly construed that to assist a claimant under the will as counsel was held to exclude one from impeaching it on one's own account, Dig. ib. 32 pr.

§ 5. 'Qui testamentum inofficiosum dixit, et non obtinuit, id quod in testamento accepit, perdere, et id fisco vindicari, quasi indigno ablatum' Dig. 5. 2. 8. 14. For other exceptions see Paul. Sent. Rec. 4. 5. 9. 10, Dig. 34. 9. 5, 5. 2. 22. 1 and 3, ib. 30. 1.

§ 6. Gifts from the testator inter vivos (i. e. not mortis causa) could not as a rule be counted as part of the quarta, unless made propter nuptias or by way of dos, Cod. 3. 28. 29, or unless it had been so expressly agreed between the parties, Cod. ib. 35. 2; for other exceptions see Cod. ib. 30. 2, Cod. 6. 20. 20 pr., Dig. 5. 2. 25 pr.

§ 7. The true ground of the querella inofficiosi being the testator's impietas or want of natural affection, success depended on the plaintiff's ability to show 'immerentem se et ideo et indigne praeteritum vel etiam exheredatione summotum' Dig. 5. 2. 5: the onus of proving the existence of reasonable grounds for the plaintiff's exclusion lay on the defendant (instituted heir), who might meet the plaintiff by the exceptio ingratitudinis, Cod. 3. 28. 19, ib. 23.

plures, quibus agere de inofficioso testamento permittitur, una quarta eis dari possit, ut pro rata distribuatur eis, id est pro virili portione quarta.

XIX

DE HEREDUM QUALITATE ET DIFFERENTIA

G. ii. 152. **Heredes autem aut necessarii dicuntur aut sui et necessarii**
G. ii. 153. 1 **aut extranei. Necessarius heres est servus heres institutus: ideo sic appellatus, quia, sive velit sive nolit, omnimodo post**
G. ii. 154. **mortem testatoris protinus liber et** necessarius **heres** fit. **unde qui facultates suas suspectas habent, solent servum suum primo aut secundo vel etiam ulteriore gradu heredem instituere, ut, si creditoribus satis non fiat, potius eius heredis bona quam ipsius testatoris** a creditoribus possideantur vel distrahantur vel
G. ii. 155. inter eos dividantur. **pro hoc tamen incommodo illud ei commodum praestatur, ut ea, quae post mortem patroni sui sibi adquisierit, ipsi reserventur: et quamvis** non sufficiant bona

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By Nov. 115. 3–5 Justinian made a considerable change in this branch of law; he required that ascendants should not only leave descendants the portio (and vice versa), but should institute them heirs, exheredation being allowed only for definite reasons (of which more than a dozen are specified in the enactment), and the reason in the particular case being required to be stated in the will. Violation of this new rule entailed avoidance of the actual institution, the intestate heirs taking the place of the institutus; in other respects the dispositions of the will were not affected. It was not necessary that the amount in which an ascendant or descendant was instituted should be equivalent to his due share. This enactment made no change in respect of the reciprocal rights of brother and sister, but it altogether excluded ascendants and descendants from the old querella: if not instituted at all, they took the place of the heir instituted, the will in other respects remaining good (c. 3. 14): if instituted in less than they were entitled to, they sued the heir for the balance (c. 5 pr.).

Tit. XIX. § 1. Only servi of the testator's own (proprii) could be necessarii heredes, including also a free person in mancipio to him, who, however, was entitled, like sui, to the beneficium abstinendi, referred to in § 2 inf. (Gaius ii. 160). As appears from Tit. 15 pr. supr., it was usual for testators, if they had the least reason to suspect their circumstances to be embarrassed, to appoint one or more of their own slaves as final substituti, whereby they were saved from intestacy and posthumous insolvency: and by the lex Aelia Sentia the testamentary manumission and institution of a slave was allowed for this purpose even in fraudem creditorum, Gaius i. 21, Cod. 6. 27. 2. Under the bankruptcy system

defuncti creditoribus **iterum ex** ea causa res **eius**, quas sibi adquisierit, **non veneunt. Sui autem et necessarii heredes** **2** G. ii. 156.
sunt veluti filius filia nepos neptisque ex filio et deinceps ceteri liberi, **qui modo in potestate morientis fuerint, sed ut nepos neptisve sui heredes sint, non sufficit eum eamve in potestate avi mortis tempore fuisse, sed opus est, ut pater eius vivo patre suo desierit suus heres esse aut morte interceptus aut qualibet alia ratione liberatus potestate : tunc enim nepos neptisve in locum patris sui succedit. sed sui quidem heredes** G. ii. 157.
ideo appellantur, quia domestici heredes sunt et vivo quoque patre quodammodo domini existimantur. unde etiam, si quis intestatus mortuus sit, prima causa est in successione liberorum. necessarii vero ideo dicuntur, quia omnimodo, sive velint sive nolint, tam ab intestato quam ex testamento heredes fiunt.

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called venditio bonorum (Poste's Gaius, pp. 326 sq.) the bankrupt had become infamis, but in Justinian's time only fraudulent bankruptcy operated thus. The first stage in such proceedings was to obtain a decree from the praetor of missio in possessionem (bonorum) rei servandae causa : ultimately the property was sold in lots (bonorum distractio, whence distrahantur in the text) and the proceeds divided among the creditors according to their proved claims ; see on Bk. iii. 12 inf.

The privilege which a necessarius heres enjoyed of being liable for the testator's debts only so far as the estate went, is called beneficium separationis, 'item sciendum est necessarium heredem servum cum libertate institutum impetrare posse separationem, scilicet ut, si non attigerit bona patroni, in ea causa sit, ut ei quicquid postea adquisierit separetur, sed et si quid ei a testatore debetur' Dig. 42. 6. 1. 18. Gaius (ii. 155) says that he was not entitled to keep for himself anything which 'ei ex hereditaria causa fuerit adquisitum'.

§ **2**. With the description of sui as domestici heredes cf. Plautus, Trinum. 2. 2. 48, where a son says to his father 'de meo : nam quod tuum'st, meum'st', cf. also Terence, Heaut. 1. 1. 79, Cic. in Verr. 2. 1. 44 'quibuscum (i. e. ex liberis) vivi bona partimur', Pliny, Paneg. 37, Ausonius, Idyl. 3. 3. It seems from Dig. 29. 2. 6. 5 that grandchildren who are in their grandfather's power along with their own father are domestici heredes and necessarii, so that if the grandfather institutes such a grandchild, the inheritance is ipso iure acquired for the child's own father : see Sohm, Institutionen, § 96 (p. 417 in the English Translation by Ledlie).

This 'beneficium abstinendi' exempted a suus heres from all liability for his father's debts, 'si se hereditati non immiscuerit,' i. e. if he did nothing from which acceptance of the hereditas could be inferred ; 'ut quamvis creditoribus hereditariis iure civili teneantur, tamen in eos actio

G. ii. 158. sed his praetor permittit volentibus abstinere se ab hereditate, ut potius parentis quam ipsorum bona similiter a creditoribus possideantur.

G. ii. 161. 3 Ceteri, qui testatoris iuri subiecti non sunt, extranei heredes appellantur. itaque liberi quoque nostri, qui in potestate nostra non sunt, heredes a nobis instituti extranei heredes videntur. qua de causa et qui heredes a matre instituuntur, eodem numero sunt, quia feminae in potestate liberos non habent. servus quoque a domino heres institutus et post testamentum factum
4 ab eo manumissus eodem numero habetur. In extraneis heredibus illud observatur, ut sit cum eis testamenti factio, sive ipsi heredes instituantur sive hi qui in potestate eorum sunt. et id duobus temporibus inspicitur, testamenti quidem facti, ut constiterit institutio, mortis vero testatoris, ut effectum habeat. hoc amplius et cum adit hereditatem, esse debet cum eo testamenti factio, sive pure sive sub condicione heres institutus sit: nam ius heredis eo vel maxime tempore inspiciendum est, quo adquirit hereditatem. medio autem tempore inter factum testamentum et mortem testatoris vel condicionem institutionis existentem mutatio iuris heredi non nocet, quia ut diximus tria tempora inspici debent. testamenti autem factionem non solum is habere videtur, qui testamentum facere potest, sed etiam qui ex alieno testamento vel ipse capere potest vel alii adquirere, licet non potest facere testamentum. et ideo et furiosus et mutus et postumus et infans et filius familias et servus alienus testamenti factionem habere dicuntur: licet

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non detur, si velint derelinquere hereditatem' Dig. 29. 2. 57 pr.; and a suus heres who was a minor was not prejudiced even by such 'immixtion', § 5 inf., Dig. 29. 2. 57 pr. and 1. The result of this privilege was practically to assimilate the suus et necessarius heres to an extraneus; consequently, he could, like the latter, be compelled by the magistrate to decide within a prescribed time whether he meant to avail himself of it or not, Dig. 28. 8. 7 pr., Cod. 6. 30. 19. If he did, he was treated as if he was not really heir at all; he had merely 'nudum nomen heredis' Dig. 38. 17. 2. 8, 'hunc qui abstinuit praetor non habet heredis loco' Dig. 11. 1. 12. pr. Consequently, the bonorum possessio became delata, in the first instance, to the substituti, Dig. 42. 1. 44, and in default of these to the heredes ab intestato in their several degrees of proximity, and in the last resort to the fiscus. The beneficium abstinendi passed to the heirs of the instituted suus, Dig. 29. 2. 7. 1, Cod. 6. 30. 19.

§ 4. For 'testamenti factio passiva' see on Tit. 14 pr., Tit. 17. 6 supr.

enim testamentum facere non possunt, attamen ex testamento vel sibi vel alii adquirere possunt. **Extraneis autem heredibus** 5 G. ii. 162. **deliberandi potestas est de adeunda hereditate vel non adeunda.**

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§ 5. By the civil law the institutus was not bound to accept or decline the hereditas within any definite time, though such a period was often fixed by the testator, non-acceptance within which caused forfeiture of delatio to the substituti. Where this was done, both the prescribed interval and the signification of acceptance were called cretio, Gaius ii. 164; the latter was required to be made in a recognised form (ib. 166) and before witnesses (Varro, de ling. Lat. 6. 81, Cic. ad Att. 13. 46). Two kinds of cretio were distinguished, vulgaris (Gaius ii. 171, 2), by which the institutus was bound to accept within so many days only after he knew of his institution and was able to make aditio, and continua (Gaius ii. 172, 3), which was not so favourable to the institutus, because the time began to run immediately on the testator's decease, and might have wholly elapsed before he was able to take advantage of his rights or was even aware of them. The solemn forms of cretio, which are preserved by Gaius, were abolished A.D. 407 by Honorius and Arcadius, Cod. 6. 30. 17, though of course this did not in any way prevent testators from still making the institution conditional on acceptance within a fixed time from the date of decease.

But though no rule of law required a reasonably prompt aditio, it was always open to the deceased's creditors (and we may add to legatees, fideicommissarii, substituti, and other persons jointly instituted, Cod. 6. 30. 9) to petition the praetor to fix a time within which it must be made, 'solet praetor, postulantibus hereditariis creditoribus, tempus constituere, intra quod si velit adeat hereditatem; si minus, ut liceat creditoribus bona defuncti vendere' Gaius ii. 167. The interval so fixed was called 'spatium deliberandi: ait praetor, si tempus ad deliberandum petet, dabo' Dig. 28. 8. 1. 1. Under Justinian no longer than nine months might be allowed for this purpose, though this might be extended to a year upon personal petition to the emperor, Cod. 6. 30. 9, and he also entirely altered the legal position of the institutus by enacting that by doing nothing in the way of either refusal or acceptance within the time allowed he lost not the latter right but the former, Cod. 6. 30. 22. 14. An institutus whose title was threatened by querella inofficiosi was required to accept within six months, or within twelve if he and the claimant resided in different jurisdictions, Cod. 3. 28. 36. 2. Bonorum possessio (as contrasted with the hereditas) had in every case to be accepted within a fixed limit of time, a year being allowed to ascendants and descendants, and a hundred days (tempus utile in both cases) to all other persons, Bk. iii. 9. 9 and 10 inf.

By the act of acceptance the interval which had elapsed since the decease was held by a fiction to be obliterated; 'heres quandoque adeundo hereditatem iam tunc a morte successisse defuncto intellegitur' Dig. 29. 2. 54. The effect of acceptance (until Justinian) had been to

G. ii. 163. **sed sive is, cui abstinendi potestas est, immiscuerit se bonis hereditariis, sive** extraneus, **cui de adeunda hereditate deliberare licet, adierit, postea relinquendae hereditatis facultatem**

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produce a confusio between the proprietary relations of the deceased and those of the heir; what had been two properties, two sets of rights of action, two sets of liabilities, were now combined in one; hence debts which either owed to the other were cancelled, 'si debitor heres creditori extiterit, confusio hereditatis perimit petitionis actionem' Dig. 46. 3. 75, and iura in re which the one had enjoyed over the property of the other were extinguished, Dig. 18. 4. 2. 18 and 19; cf. (2) p. 219 supr. But possession did not pass to the heir without an independent apprehensio by him, 'quia hereditas in eum id tantum transfundit, quod est hereditatis: non fuit autem possessio hereditatis' Dig. 47. 4. 1. 15.

Subject to the exceptions noticed in the text, the acceptance was irrevocable. The heir might have been mistaken in his estimate of the assets and liabilities of the deceased, but having once taken upon himself the universitas iuris, he could not get rid of it: semel heres, semper heres. He thus became as fully liable for the deceased's debts as though he had contracted them himself, 'hereditas autem quin obliget nos aeri alieno etiamsi non sit solvendo plus quam manifestum est' Dig. 29. 2. 8 pr. Under such circumstances the hereditas was said to be damnosa, Dig. 17. 1. 32; 29. 2. 57. 1; but if its solvency appeared doubtful, the institutus could protect himself by making an arrangement with the creditors before acceptance, by which the latter resigned any claims which they might have against the estate beyond its actual value; he then accepted as their agent and mandatary, and could recover from them any loss which he might sustain in so doing, Dig. 17. 1. 32: the creditors might even agree by resolution to accept so much in the pound, and here the majority bound the minority, Dig. 2. 14. 7. 17, ib. 8–10 pr. Conversely, the creditors of the deceased might suspect that though the latter's assets were sufficient to meet all their claims, they would not, even with the heir's own property, suffice to pay the latter's debts also; in such a case as this they were entitled to apply within five years to the praetor for a separatio bonorum, the effect of which was to prefer their own rights against the bona separata to those of the heir's own creditors, though they forfeited all claim to any subsequent payment from the heir's own property, should the separated portion prove in fact insufficient for their satisfaction, Dig. 42. 6. 1. 1. The heir, however, is bound by his testator's dispositions. He may in his will have done more than institute an heir; he may have given legacies or fideicommissa, left instructions as to his funeral, appointed guardians to his children and settled the arrangements for their education, forbidden alienation of certain res hereditariae, and so forth. All these dispositions are valid and binding on the heir.

When there are two or more joint heirs, the hereditas passes to them collectively, as a whole; there is said to be a communio in it between

non habet, nisi minor sit annis viginti quinque: nam huius aetatis hominibus sicut in ceteris omnibus causis deceptis, ita et si temere damnosam hereditatem susceperint, praetor succurrit. Sciendum tamen est **divum Hadrianum etiam maiori** 6

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them, but to each of them individually it passes only pro rata; each coheres is not liable for the testator's debts in full, but only in the same ratio in which he is instituted, the liabilities being divided between them ipso iure, Cod. 3. 36. 3. Division of course would usually take place by arrangement, but if any one refused to concur, he could be compelled by the actio familiae erciscundae, to which also he could resort if he thought he was being unfairly treated by his coheirs; 'haec actio proficiscitur ex lege duodecim tabularum, namque coheredibus, volentibus a communione discedere, necessarium videbatur aliquam actionem constitui, qua inter eos res hereditariae distribuerentur' Dig. 10. 2. 1 pr. Sometimes a coheres could not claim a division without bringing into the inheritance certain property of his own (collatio bonorum). This practice had originated in the praetorian bonorum possessio, whether contra tabulas or ab intestato; the praetor would not admit emancipati to share the estate with their unemancipated brothers and sisters unless they brought into 'hotchpot' all that they had acquired for themselves since their own release from potestas, Dig. 37. 6. 1. 14. The emperors, especially A. Pius and Leo, further developed the obligation, requiring that where a number of descendants succeeded jointly to a common ascendant, each female should bring in the dos which she had received from the latter (dotis collatio), and the rule was subsequently extended to much other property which descendants of either sex had received from the common ascendant in his lifetime, Dig. 37. 6.

For the relief of minors by in integrum restitutio see on Bk. iv. 6. 33 inf.

§ **6**. For the privilege of soldiers cf. Cod. 6. 30. 22 pr. and 15 'milites, etsi propter simplicitatem praesentis legis subtilitatem non observaverint, in tantum tamen teneantur, quantum in hereditate invenerint'.

By the important change to which he here alludes Justinian effected a complete reformation in the Roman law of inheritance, so far as relates to the character and liabilities of the heres. As Dr. Hunter says (Roman Law, p. 574), 'it was a bold and successful stroke to convert the heir into a mere official, designated by the deceased for the purpose of winding up his affairs and distributing his property. The heir was now a mere executor, with the privilege of being residuary legatee, and if the testator did not forbid it, of retaining the Falcidian fourth.'

By this enactment (Cod. 6. 30. 22) Justinian gave the person to whom the hereditas was delata, whether ab intestato or under a will, the option between applying for a spatium deliberandi, and making a complete inventory of the property of the deceased. If he chose the latter, he must, with the assistance of a notary and a prescribed number of witnesses representing the creditors and legatees, begin the inventory within one month of his becoming aware of his right, and finish it within two months

viginti quinque annis veniam dedisse, cum post aditam hereditatem grande aes alienum, quod aditae hereditatis tempore latebat, emersisset. sed hoc divus quidem Hadrianus speciali beneficio cuidam praestitit: divus autem Gordianus postea in militibus tantummodo hoc extendit: sed nostra benevolentia commune omnibus subiectis imperio nostro hoc praestavit beneficium et constitutionem tam aequissimam quam nobilem scripsit, cuius tenorem si observaverint homines, licet eis adire hereditatem et in tantum teneri, in quantum valere bona hereditatis contingit: ut ex hac causa neque deliberationis auxilium eis fiat necessarium, nisi omissa observatione nostrae constitutionis et deliberandum existimaverint et sese veteri gravamini aditionis supponere maluerint.

G. ii. 167. **7** Item extraneus **heres** testamento **institutus aut ab intestato ad legitimam hereditatem vocatus potest aut pro herede gerendo vel etiam nuda voluntate suscipiendae hereditatis heres fieri.** pro herede

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more: if, however, he was at a distance, he was allowed a year; Cod. 6. 30. 22. 2 and 3. During this interval neither creditors nor legatees might molest him in any way, though at its termination they could require him to swear to the accuracy of the inventory, which he also had to sign. By selecting this procedure, the heir was exempted from all liability beyond the assets of the deceased, Cod. loc. cit. 4, and also from the obligation of ascertaining rights of priority, etc. among creditors; these and legatees were to be paid in the order in which they applied to him, and if the assets were exhausted unpaid creditors might resort to paid legatees, Cod. ib. 4–6, 8. The universitas iuris in fact no longer passed to the heir: there was no confusio between his proprietary relations and those of the deceased, so that iura in re aliena and debts were no longer affected in the way described, pp. 285, 286 supr., Cod. ib. 9.

If the institutus or person entitled preferred to apply for a spatium deliberandi, his old liabilities remained, ib. 14: even in this case he must make an inventory; if he did not, and accepted the inheritance, he lost his right to the Falcidian fourth, and must pay legacies and fideicommissa in full. The practical result, as Dr. Hunter remarks, was that if there was any doubt as to the solvency of the hereditas, the heir was compelled to make an inventory.

§ 7. It is possible that under the earliest law no one could accept an inheritance except by cretio, an oral declaration in prescribed terms before witnesses. But in the later periods this was unnecessary, though before the abolition of cretiones (note on § 5 supr.) a formal acceptance might have been required by the testator, Gaius ii. 166. The mere intention to accept, provided it was evidenced by words or acts (pro herede gestio), was sufficient. It might not, however, be partial (' sed

autem gerere quis videtur, si rebus hereditariis tamquam heres utatur vel vendendo res hereditarias aut praedia colendo locandove et quoquo modo si voluntatem suam declaret vel re vel verbis de adeunda hereditate, dummodo sciat eum, in cuius bonis pro herede gerit, testato intestatove obiisse et se ei heredem esse. pro herede enim gerere est pro domino gerere: veteres enim heredes pro dominis appellabant. **sicut** autem **nuda voluntate** extraneus **heres fit, ita et contraria destinatione statim ab hereditate repellitur.** eum, qui mutus vel surdus natus est vel postea factus, nihil prohibet pro herede gerere et adquirere sibi hereditatem, si tamen intellegit quod agitur. G. ii. 169.

XX

DE LEGATIS

Post haec videamus de legatis. quae pars iuris extra propositam quidem materiam videtur: nam loquimur de his iuris figuris, quibus per universitatem res nobis adquiruntur. sed cum omnino **de testamentis deque heredibus qui testamento instituuntur locuti sumus, non sine causa sequenti loco potest haec iuris materia tractari.** G. ii. 191.

Legatum itaque est donatio quaedam a defuncto relicta. 1

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et si quis ex pluribus partibus in eiusdem hereditate institutus sit, non potest quasdam partes repudiare, quasdam agnoscere' Dig. 29. 2. 2), or conditional, for hereditatis aditio was an actus legitimus: 'sed et si quis ita dixerit, si solvendo hereditas est, adeo hereditatem, nulla aditio est' Dig. ib. 51. 2. It would seem that aditio itself could not be made on behalf of the institutus by an agent, Dig. 36. 1. 65 pr.; though this rule admitted of exceptions in favour of juristic persons, Dig. 36. 1. 6. 4, infants, Cod. 6. 30. 18 pr., and those of weak intellect, Cod. 5. 70. 7 pr., and the declaration of acceptance might be made by an agent always, Dig. 36. 1. 65. 3. Before delatio a person could not bind himself by either acceptance or repudiation, but after delatio either determination, when once manifested, was irrevocable, Cod. 6. 31.

For the mode in which bonorum possessio was obtained see Bk. iii. 9. 10 inf.

Tit. XX. 1. Hereditas is universal succession, sometimes under a will, sometimes ab intestato: legatum is singular succession, under a will only, to a part, directly or indirectly, of the testator's property: 'legatum est delibatio hereditatis, qua testator ex eo, quod universum heredis foret, alicui quid collatum velit' Dig. 30. 116 pr. Historically, the idea of legacy is inseparable from that of testamentum; a legacy can be charged only on a testamentary heir, and only through the will itself,

G.ii.192. **2** Sed olim quidem erant **legatorum genera quattuor: per vindicationem, per damnationem, sinendi modo, per praeceptionem:** et certa quaedam verba cuique generi legatorum adsignata erant, per quae singula genera legatorum significabantur. sed ex constitutionibus divorum principum sollemnitas huiusmodi verborum penitus sublata est. nostra autem constitutio, quam cum magna fecimus lucubratione, defunctorum voluntates validiores esse cupientes et non verbis, sed voluntatibus eorum faventes, disposuit, ut omnibus legatis una sit natura et, quibuscumque verbis aliquid derelictum sit, liceat legatariis id persequi non solum per actiones personales, sed etiam per in rem et per hypothecariam: cuius constitutionis perpensum modum ex ipsius tenore perfectissime accipere possibile est.

Tit. 23. 10 inf.: no legatee is entitled unless some one accepts under the testamentum: no one can be a legatee who has not testamenti factio passiva (note on Tit. 14 pr. supr.); the words in which a legacy is given must be formal, imperative, and in the Latin tongue (civilia verba); 'legatum est, quod legis modo, id est imperative, testamento relinquitur: nam ea, quae precativo modo relinquuntur, fideicommissa vocantur' Ulpian, Reg. 24. 1.

§ **2.** The four formulae, alluded to here, in which legacies could be given under the older law, are described at length in Gaius ii. 192–223, and Ulpian, Reg. 24. 2–13. The first two are undoubtedly the oldest, for their effects are clearly due to the nature of the earliest wills as legislative acts. They differed from one another, *inter alia*, (1) in respect of the property which could be given by them respectively. Nothing could be given per vindicationem, with small exceptions, which did not belong to the testator ex iure Quiritium at the time both of the execution of the will and of his decease; a legacy sinendi modo might comprise property of the heir as well as of the testator: per damnationem could be given property belonging to any one, the heir being bound, if possible, to procure and convey it to the legatee; see § 4 inf. (2) In respect of the remedy available to the legatee: if the disposition were made per vindicationem or praeceptionem, he could recover by real action: if sinendi modo, it was doubted whether the heir was under any active obligation at all, Gaius ii. 213–14: if per damnationem, the remedy was in personam only: this was an actio ex testamento, differing according to Girard (4th ed. p. 923) from the condictiones, and tried in the legis actio period by manus iniectio, whence it retained in certain cases the character of being in duplum adversus inficiantem. (3) In respect of the effect of a gift of the same thing to two or more persons disiunctim, Gaius ii. 205. The importance of these distinctions of form was much reduced by the SC. Neronianum, A.D. 64, which apparently enacted that whichever of the four formulae was actually employed, it should be construed as

Sed non usque ad eam constitutionem standum esse existi- 3
mavimus. cum enim antiquitatem invenimus legata quidem stricte concludentem, fideicommissis autem, quae ex voluntate magis descendebant defunctorum, pinguiorem naturam indulgentem: necessarium esse duximus omnia legata fideicommissis exaequare, ut nulla sit inter ea differentia, sed quod deest legatis, hoc repleatur ex natura fideicommissorum et, si quid amplius est in legatis, per hoc crescat fideicommissi natura. sed ne in primis legum cunabulis permixte de his exponendo studiosis adulescentibus quandam introducamus difficultatem, operae pretium esse duximus interim separatim prius de legatis et postea de fideicommissis tractare, ut natura utriusque iuris cognita facile possint permixtionem eorum eruditi suptilioribus auribus accipere.

Non solum autem testatoris vel heredis **res**, sed et **aliena** 4 G. ii. 202.
legari potest: ita ut heres cogatur **redimere** eam **et praestare**

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though it were that most favourable to the legatee, which usually would be that per damnationem: 'SC° Neroniano cautum est, ut quod minus aptis (or ratis) verbis legatum est, perinde sit ac si optimo iure legatum esset: optimum autem ius legati per damnationem est' Ulpian, Reg. 24. 11: its usual effect was thus to render valid legacies left in one of the other three forms which previously would have been void: Gaius ii. 197. 212. 218. Some hundreds of years later testators were enabled by an enactment of Constantius, A.D. 339, to give legacies in any words they chose, whether Greek or Latin, Cod. 6. 37. 21. Justinian's own regulations, mentioned in this and the following sections, assimilated the civil law bequest (legatum) so far as was possible to fideicommissa, the nature of which will appear from Tits. 23 and 24 inf. Any legal superiority which either had possessed over the other was in future to be common to both, and the object of a bequest, whether technically a legatum or a fideicommissum, was to be recovesable by the beneficiary by the most appropriate remedy, real or personal. The legatee acquired a real right to the res legata in every case where it belonged to the testator, unless indeed the testator himself expressed a contrary intention, Cod. 6. 43. 1, and in no other; he acquired a personal right against the heir in every case, and this was secured by a statutory hypotheca, first given by Justinian himself, over everything which the person on whom the legacy or fideicommissum was charged had himself received from the inheritance, Cod. 6. 43. 1. 2. It is to be observed, however, that Justinian's exaequatio of the rules relating to the two forms of bequest did not affect the difference between manumission by will and the fideicommissum libertatis.

§ 3. For the principal original differences between legacies and fideicommissa see on Tit. 23. 1 inf.

§ 4. The true rule, of which only an illustration is afforded by the

vel, si non potest redimere, **aestimationem eius dare.** sed si talis res sit, cuius non est commercium, nec aestimatio eius debetur, sicuti si campum Martium vel basilicas vel templa vel quae publico usui destinata sunt legaverit: nam nullius momenti legatum est. quod autem diximus alienam rem posse legari, ita intellegendum est, si defunctus sciebat alienam rem esse, non et si ignorabat: forsitan enim, si scisset alienam, non legasset. et ita divus Pius rescripsit. et verius est ipsum qui agit, id est legatarium, probare oportere scisse alienam rem legare defunctum, non heredem probare oportere ignorasse alienam, quia semper necessitas probandi incumbit illi qui agit.

5 Sed et si rem obligatam creditori aliquis legaverit, necesse habet heres luere. et hoc quoque casu idem placet, quod in re aliena, ut ita demum luere necesse habeat heres, si sciebat defunctus rem obligatam esse: et ita divi Severus et Antoninus rescripserunt. si tamen defunctus voluit legatarium luere

6 et hoc expressit, non debet heres eam luere. Si res aliena legata fuerit et eius vivo testatore legatarius dominus factus fuerit, si quidem ex causa emptionis, ex testamento actione pretium consequi potest: si vero ex causa lucrativa, veluti ex donatione vel ex alia simili causa, agere non potest. nam traditum est duas lucrativas causas in eundem hominem et in eandem rem concurrere non posse. hac ratione si ex duobus testamentis eadem res eidem debeatur, interest, utrum rem an aestimationem ex testamento consecutus est: nam si rem, agere non potest, quia habet eam ex causa lucrativa, si aesti-

G.ii.203. 7 mationem, agere potest. **Ea quoque res, quae in rerum natura non est, si modo futura est,** recte legatur, **veluti fructus**

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legacy of a res extra commercium, is that the act which the heres has to perform in favour of the legatee must be both physically possible and legally permitted: as he cannot convey to the latter a res extra commercium, so he ought not to be compelled to pay him its value.

§ 6. The maxim 'duas lucrativas causas in eundem hominem et in eandem rem concurrere non posse' may be otherwise stated thus: if the res legata already belongs to the legatee when the dies legati cedit (Dig. 30. 82 pr.), the latter can claim its value from the heir only if and so far as he obtained it after the execution of the will for valuable consideration. If at that time it belonged to him, the disposition is void, unless he alienated it before the testator's death (Dig. 34. 7. 1. 2), or unless his own ownership was revocable (Dig. 30. 82. 1), or, thirdly, unless

qui in illo fundo nati erunt, aut quod ex illa ancilla natum erit. Si eadem res duobus legata sit sive coniunctim sive 8 G. ii. 199.
disiunctim, si **ambo perveniant ad legatum,** scinditur inter eos

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the testator or the heir had some real right over the object by which the legatee could practically be deprived of its enjoyment (e.g. pignus, usufruct, or emphyteusis), or a personal right by which he could be forced to deliver it up, Dig. 30. 71. 5, ib. 39. 2.

§ 8. So far as the form per vindicationem is concerned, the rule as to legacy of the same thing disiunctim to two or more persons is similarly stated by Gaius ii. 199, but in § 205 he adds 'si eadem res duobus pluribusve per damnationem legata sit . . . disiunctim, singulis solida res debetur, ut scilicet heres alteri rem, alteri aestimationem eius praestare debeat'. In this point the SC. Neronianum appears not to have operated at all: otherwise it is difficult to see how the rule did not become exactly the contrary of that which is here stated in the text. Justinian enacted that in no case should co-legatees of the same thing be entitled, the one to it, the other or rest to its value, 'nisi testator apertissime et expressim disposuerit, ut uni quidem res solida, aliis autem aestimatio rei singulis in solidum praestetur' Cod. 6. 51. 1. 11. As Gaius remarks (ii. 206), an important modification was made in the law of accrual between co-heirs and co-legatees by the leges Iulia and Papia Poppaea, for which see on Tit. 14 pr. supr.; these statutes, however, were no longer in force under Justinian, who speaks of the caducitas which they introduced as altogether abolished from his system, Cod. 6. 51. 1. 1.

Two or more persons are said to be co-heirs or co-legatees when the same thing is given to both or all of them. As to the technical expressions or modes by which testators could effect such conjunction, we must at the outset exclude what is called conjunction 'verbis', in which each of the apparently conjoined heirs or legatees is in fact given something different from the other or rest, 'item verbis, non etiam re [coniuncti videntur]: Titio et Seio fundum aequis partibus do lego' Dig. 32. 89; here Titius and Seius are not co-legatees in the proper sense, for what is bequeathed to them is not the same thing, but equal shares in the same thing, i.e. different things, or, as Pomponius puts it in Dig. 28. 5. 66 'quia non tam coniunxisse quam celerius dixisse videatur'. In such cases, as there is no true conjunction, the ius adcrescendi has no application. Genuine conjunction, in which the co-heirs or co-legatees, though limiting one another's rights, are regarded as against other heirs or legatees as one person (coniunctim heredes institui, and 'coniunctim legari, hoc est, totam hereditatem et tota legata singulis data esse, partes autem concursu fieri' Dig. 32. 80), could be produced in two ways, (1) 're et verbis (the coniunctim of the text): nec dubium est, quin coniuncti sint, quos et nominum et rei complexus iungit; veluti Titius et Maevius ex parte dimidia heredes sunto: vel ita, Titius Maeviusque heredes sunto: vel, Titius cum Maevio ex parte dimidia heredes sunto. Videamus autem ne, etiamsi hos articulos detrahas, et, que, cum, inter-

legatum: si alter deficiat, quia aut spreverit legatum aut vivo testatore decesserit aut alio quolibet modo defecerit, totum ad **collegatarium** pertinet. **coniunctim autem legatur**, veluti si quis dicat '**Titio et Seio hominem Stichum do lego**': **disiunctim ita 'Titio hominem Stichum do lego, Seio Stichum do lego'**. sed et si expresserit 'eundem hominem Stichum', aeque disiunctim legatum intellegitur.
9 Si cui fundus alienus legatus fuerit et emerit proprietatem detracto usu fructu et usus fructus ad eum pervenerit et postea ex testamento agat, recte eum agere et fundum petere Iulianus ait, quia usus fructus in petitione servitutis locum optinet: sed officio iudicis contineri, ut deducto usu fructu iubeat aestimationem praestari.
10 Sed si rem legatarii quis ei legaverit, inutile legatum est, quia quod proprium est ipsius, amplius eius fieri non potest: et licet alienaverit eam, non debetur nec ipsa nec aestimatio eius.
11 Si quis rem suam quasi alienam legaverit, valet legatum:

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dum tamen coniunctos accipi oporteat, veluti, Lucius Titius, Publius Maevius ex parte dimidia heredes sunto, vel ita: P. Maevius, L. Titius heredes sunto: Sempronius ex parte dimidia heres esto, ut Titius et Maevius veniant in partem dimidiam, et re et verbis coniuncti videantur' Dig. 50. 16. 142; (2) 're (the disiunctim of the text): re coniuncti videntur, non etiam verbis, cum duobus separatim eadem res legatur' Dig. 32. 89; for this mode of conjoining heirs see Dig. 50. 16. 142.

The general rule of accrual between co-legatees is tersely stated in the text, though there was some difference according to the form employed. If they were conjoined re, i.e. disiunctim, and one of more of them failed to take, the accrual operated ipso iure: there was no right of refusal in those who took, and who consequently were unaffected by any fideicommissa or other burdens imposed by the testator on those who had failed: if they were conjoined re et verbis, they had the option of refusing the shares of those who failed, or of taking them subject to such charges, Cod. 6. 51. 1. 11.

§ **9**. That by 'pervenerit' is meant 'has come by a lucrativa causa' is clear from the passage of Iulianus referred to, 'fundus mihi legatus est: proprietatem eius fundi redemi, detracto usufructu: postea venditor capite minutus est ([8], p. 220 supr.), et ususfructus ad me pertinere coepit: si ex testamento egero, iudex tanti litem aestimare debebit, quantum mihi aberit. (Marcellus.) idem erit, et si partem redemero, pars mihi legata aut donata sit: partem enim duntaxat petere debebo' Dig. 30. 82. 2 and 3.

§ **10**. Cf. Bk. iv. 6. 14 inf. For the principle (regula Catoniana) upon which a legacy of this kind was void see on § 32 inf.: cf. note on § 6 supr.

§ **11**. It is difficult to see why the rule 'plus valet quod in veritate est quam quod in opinione' did not apply to legacy of a res aliena which

nam plus valet, quod in veritate est, quam quod in opinione. sed et si legatarii putavit, valere constat, quia exitum voluntas defuncti potest habere. **Si rem suam legaverit** testator post- 12 G.ii. 198.
eaque **eam alienaverit**, Celsus existimat, si non adimendi animo vendidit, nihilo minus deberi, idque divi Severus et Antoninus rescripserunt. idem rescripserunt eum, qui post testamentum factum praedia quae legata erant pignori dedit, ademisse legatum non videri et ideo legatarium cum herede agere posse, ut praedia a creditore luantur. si vero quis partem rei legatae alienaverit, pars quae non est alienata omnimodo debetur, pars autem alienata ita debetur, si non adimendi animo alienata sit. Si quis debitori suo liberationem 13
legaverit, legatum utile est et neque ab ipso debitore neque ab herede eius potest heres petere nec ab alio qui heredis loco est: sed et potest a debitore conveniri, ut liberet eum. potest autem quis vel ad tempus iubere ne heres petat. Ex con- 14
trario si debitor creditori suo quod debet legaverit, inutile est legatum, si nihil plus est in legato quam in debito, quia nihil amplius habet per legatum. quodsi in diem vel sub condicione debitum ei pure legaverit, utile est legatum propter repraesen-

the testator thought was sua, which in § 4 supr. is said to be void: cf. also Dig. 29. 2. 15 'plus est in opinione quam in veritate'.

§ 12. The generally received opinion in Gaius' time (ii. 198) was that such a legacy was void, unless given per damnationem, and even then the heir on being sued could repel the legatee by exceptio doli: cf. Pomponius in Dig. 30. 8 pr. 'si partem alienasset, partem duntaxat . . . deberi.'

§ 13. If the testator was himself the creditor, the debtor, under Justinian, was usually released ipso facto by the legacy; for his right to compel the heir to release him cf. Dig. 34. 3. 3. 3 'agere, ut liberer per acceptilationem'. If the creditor was some one else, the debtor could compel the heir to pay the debt and so discharge him, Dig. ib. 8 pr., ib. 11 and 14. If the supposed debt was non-existent, the legatee got nothing; and the legacy was extinguished by extinction of the debt during the testator's lifetime.

§ 14. Where money due on a certain day, or on the fulfilment of a condition, is paid before the time or the occurrence of the event specified, the creditor is pro tanto better, the debtor pro tanto worse off: this gain or loss is called interusurium, commodum or incommodum repraesentationis. If a testator leaves to a supposed creditor the amount of a non-existent debt, the legacy is void if the debt is simply referred to, but if its amount is clearly specified it can be claimed, 'si decem quae Titio debeo legavero nec quicquam debeam, falsa demonstratio (§ 30 inf.

tationem. quodsi vivo testatore dies venerit aut condicio
extiterit, Papinianus scripsit utile esse nihilo minus legatum,
quia semel constitit. quod et verum est: non enim placuit
sententia existimantium extinctum esse legatum, quia in eam
15 causam pervenit, a qua incipere non potest. Sed si uxori
maritus dotem legaverit, valet legatum, quia plenius est lega-
tum quam de dote actio. sed si quam non acceperit dotem
legaverit, divi Severus et Antoninus rescripserunt, si quidem
simpliciter legaverit, inutile esse legatum: si vero certa
pecunia vel certum corpus aut instrumentum dotis in praele-
16 gando demonstrata sunt, valere legatum. Si res legata sine
facto heredis perierit, legatario decedit. et si servus alienus
legatus sine facto heredis manumissus fuerit, non tenetur heres.
si vero heredis servus legatus fuerit et ipse eum manumiserit,
teneri eum Iulianus scripsit, nec interest, scierit an ignoraverit
a se legatum esse. sed et si alii donaverit servum et is cui
donatus est eum manumiserit tenetur heres, quamvis ignor-
17 averit a se eum legatum esse. Si quis ancillas cum suis natis
legaverit, etiamsi ancillae mortuae fuerint, partus legato

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non perimit legatum' Dig. 30. 75. 1, cf. Dig. 31. 88. 10, and the next section of this Title. The doctrine of Papinian here stated is not universally recognized in the Corpus Iuris; it is confirmed by Dig. 50. 17. 85. 1, but is contradicted, in its general form, in Dig. 34. 8. 3. 2 'nam quae in eam causam pervenerunt a qua incipere non poterant pro non scriptis habentur', and in its particular application in Dig. 31. 82 pr. (Paulus) 'dicendum erit inutile effici legatum, quanquam constiterit ab initio'. For the technical meaning of dies venit in connection with obligations see on § 20 inf.

§ 15. The advantages of the action on the legacy over the actio de dote were that the heir could not claim the statutory interval of one year before restitution, which was allowed in ordinary cases (which probably is the explanation of 'praelegare', so common in this form of legacy), Dig. 33. 4. 1. 2, and that certain sets-off were excluded which could be pleaded in the action.

§ 17. The opposition of ordinarius to vicarii servi is found in Dig. 14. 4. 5. 1; 15. 1. 17, ib. 19 pr. The former was a slave holding some definite post in his master's household, the latter were his assistants, and usually formed part of his peculium: in fact, a slave often bought a vicarius with part of his peculium to lighten his own duties, Horace, Sat. 2. 7. 79; for the whole subject v. Becker's Gallus.

For the difference between instructus and cum instrumento cf. Dig. 33. 7. 12. 27 'plus esse, cum instructus fundus legetur, quam si cum instrumento: . . . omnia, quae eo collata sunt, ut instructior esset pater-

cedunt. idem est, si ordinarii servi cum vicariis legati fuerint ut, licet mortui sint ordinarii, tamen vicarii legato cedant. sed si servus cum peculio fuerit legatus, mortuo servo vel manumisso vel alienato et peculii legatum extinguitur. idem est, si fundus instructus vel cum instrumento legatus fuerit: nam fundo alienato et instrumenti legatum extinguitur. Si grex 18
legatus fuerit posteaque ad unam ovem pervenerit, quod superfuerit vindicari potest. Grege autem legato etiam eas oves, 19
quae post testamentum factum gregi adiciuntur, legato cedere Iulianus ait: esse enim gregis unum corpus ex distantibus capitibus, sicuti aedium unum corpus est ex cohaerentibus lapidibus: aedibus denique legatis columnas et marmora, quae post testamentum factum adiecta sunt, legato cedere. Si 20
peculium legatum fuerit, sine dubio quidquid peculio accedit

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familias, instructo contineri', ib. pr. 'instrumentum [fundi] est apparatus rerum diutius mansurarum, sine quibus exerceri nequiret possessio', ib. 27. 16 'inter instrumentum et ornamentum multum interesse, instrumenti enim ea esse, quae ad tutelam domus pertinerent, ornamenti, quae ad voluptatem'. Thus 'instrumentum involved the idea of a means to an end, but that end was to get the use of the land; it did not include household furniture. Fundus instructus, although there was some variety of opinion on the subject, seems to have been considered as including not only instrumentum, but everything prepared for the comfort or pleasure of the owner. Such a legacy, therefore, includes the furniture of the farmhouse, the clothes, gold, silver, wine, and utensils of the testator, also the domestic slaves, the books and library, but not the crop ready for the market'. Hunter, Roman Law, p. 723; cf. Mr. Roby's edition of Dig. 7. 1. pp. 74, 75.

§ **20**. Dies cedit marks the commencement of a right, or the moment at which it comes into existence: dies venit indicates the moment at which it can first be enforced by action: 'cedere diem significat, incipere deberi pecuniam: venire diem significat, eum diem venisse, quo pecunia peti possit' Dig. 50. 16. 213. Thus, if a man promises to pay 10*l.* this day six months, he is bound, and the other party acquires a right to have the money then, at once (dies cedit): but he cannot be compelled to pay until dies venit, i.e. until the six months have elapsed; Bk. iii. 15. 2 inf. Originally, if the legatee outlived the testator, and the legacy was unconditional (or the condition, if there were one, had been fulfilled), dies cessit immediately on the testator's decease: the right was acquired, and therefore passed to the legatee's heir even if he himself died immediately after the testator: 'si post diem legati cedentem legatarius decesserit, ad heredem suum transfert legatum' Dig. 36. 2. 5 pr. This was altered by the lex Papia Poppaea, which postponed dies cedit to the date of the opening of the will, Ulpian, Reg. 17. 1, but the old law was restored by

vel decedit vivo testatore, legatarii lucro vel damno est. quodsi post mortem testatoris ante aditam hereditatem servus adquisierit, Iulianus ait, si quidem ipsi manumisso peculium legatum fuerit, omne, quod ante aditam hereditatem adquisitum est, legatario cedere, quia dies huius legati adita hereditate cedit: sed si extraneo peculium legatum fuerit, non cedere ea legato, nisi ex rebus peculiaribus auctum fuerit peculium. peculium autem nisi legatum fuerit, manumisso non debetur, quamvis si vivus manumiserit, sufficit, si non adimatur: et ita divi Severus et Antoninus rescripserunt. idem rescripserunt peculio legato non videri id relictum, ut petitionem habeat pecuniae, quam in rationes dominicas impendit. idem rescripserunt peculium videri legatum, cum rationibus redditis
21 liber esse iussus est et ex eo reliquas inferre. Tam autem corporales res quam incorporales legari possunt. et ideo et

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Justinian, Cod. 6. 51. 1 *c*. If the legacy was conditional, dies cessit only on the fulfilment of the condition: with rights arising ex contractu it was somewhat different; see on Bk. iii. 15. 4 inf. Dies (legati) venit when the heir accepted, unless of course the dies cedens was later owing to an unfulfilled condition, or unless a later day was fixed by the testator himself: 'omnia quae testamentis sine die vel condicione adscribuntur, ex die aditae hereditatis praestentur' Dig. 31. 32 pr.

No acceptance of a legacy was necessary, in the sense that an institutus could not become heir without aditio: but one could be declined, and if this were done, the legatee was regarded as never having acquired any right upon the testator's decease whatever, Dig. 30. 38. 1.

If a slave's peculium was bequeathed to an extraneus, the latter's rights were fixed (dies cedit) at the testator's decease: he became entitled to the amount of the peculium as it stood at that moment, but to nothing which was subsequently added to it, as it were, from outside. But if the slave, being manumitted by the will, was himself the legatee, his rights were not fixed till aditio (an exception to the general rule), because unless and until some institutus accepted his manumission did not take effect, and being still a slave he could have no rights.

The words 'et ex eo reliquas inferre' at the end of the section are interpreted by Theophilus as part of the rescript, not of the will: but it is clear that they belong to the latter, the manumission being ex die, and taking effect from the giving in of the slave's accounts with his master, the adverse balance being made up out of his peculium, 'et quod reliquum est . . . solvere debet' Dig. 35. 1. 111.

§ **21**. This is called legatum nominis, nomen being the technical term for what we call a chose in action. The legatee could sue the testator's debtor by actio utilis, Cod. 6. 37. 18, and could also claim an express assignment from the heres, Dig. 30. 44. 6. If the debtor paid the heir,

quod defuncto debetur, potest alicui legari, ut actiones suas heres legatario praestet, nisi exegerit vivus testator pecuniam: nam hoc casu legatum extinguitur. sed et tale legatum valet: 'damnas esto heres domum illius reficere' vel 'illum aere alieno liberare'. Si generaliter servus vel alia res legetur, **22**
electio legatarii est, nisi aliud testator dixerit. Optionis **23**
legatum, id est ubi testator ex servis suis vel aliis rebus optare legatarium iusserat, habebat in se condicionem, et ideo nisi ipse legatarius vivus optaverat, ad heredem legatum non transmittebat. sed ex constitutione nostra et hoc in meliorem statum reformatum est et data est licentia et heredi legatarii optare, licet vivus legatarius hoc non fecit. et diligentiore tractatu habito et hoc in nostra constitutione additum est, ut, sive plures legatarii existant, quibus optio relicta est, et dissentiant in corpore eligendo, sive unius legatarii plures heredes, et inter se circa optandum dissentiant alio aliud corpus eligere cupiente, ne pereat legatum (quod plerique prudentium contra benevolentiam introducebant), fortunam esse huius optionis iudicem et sorte esse hoc dirimendum, ut, ad quem sors perveniat, illius sententia in optione praecellat.

Legari autem illis solis potest, cum quibus testamenti factio **24**

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the latter could be compelled to transfer the amount so received to the legatee: if payment were made to the testator in his lifetime, the legacy became void unless the will clearly disclosed a contrary intention, Dig. 32. 11. 13, ib. 64.

§ **22**. Where a res non fungibilis (for which see on Bk. iii. 14 pr. inf.) is bequeathed without further specification (e. g. a slave, a horse, a jewel) it is technically called a legatum generis. Unless there was evidence of a contrary intention, such legacies were valid only (1) if the inheritance actually comprised a thing or things of the genus bequeathed, Dig. 30. 71 pr., and (2) if the genus was sufficiently definite: thus the legacy of an estate is void, that of a house is valid, Dig. 23. 3. 69. 4: 30. 71. pr. Under the older law it would seem that as a general rule the legatee had the choice of the object if the bequest was per vindicationem, the heir if it was per damnationem: but, as is said in the text, under Justinian, unless the testator directed otherwise, the election always rested with the former, subject to the restriction that he must not choose the best specimen of the genus; but cf. Dig. 33. 6. 4. If the choice was given to the heir, he might not select the worst: if to a third person, he might choose neither the best nor the worst, Dig. 30. 37 pr.

§ **23**. Justinian's enactment on this matter is in Cod. 6. 43. 3.

G. ii. 238. 25 est. **Incertis** vero **personis** neque **legata** neque fideicommissa
olim relinqui concessum erat: nam nec miles quidem incertae
personae poterat relinquere, ut divus Hadrianus rescripsit.
incerta autem persona videbatur, **quam incerta opinione
animo suo testator** subiciebat, **veluti** si quis **ita** dicat: '**qui-
cumque filio meo in matrimonium filiam suam collocaverit, ei
heres meus** illum fundum **dato**:' **illud quoque, quod** his relin-
quebatur, **qui post testamentum scriptum primi consules
designati erunt, aeque incertae personae legari** videbatur: **et
denique multae aliae huiusmodi species sunt. libertas quoque**
G. ii. 239. **non** videbatur **posse incertae personae dari**, quia placebat
G. ii. 240. **nominatim servos liberari. tutor quoque certus dari** debebat.
G. ii. 238. **sub certa vero demonstratione**, id est ex certis personis in-
certae **personae, recte** legabatur, **veluti** '**ex cognatis meis qui
nunc sunt** si quis filiam meam uxorem duxerit, **ei heres meus**
illam rem **dato**'. incertis autem personis legata vel fideicom-
missa relicta et per errorem soluta repeti non posse sacris
G. ii. 241. 26 constitutionibus cautum erat. **Postumo quoque alieno inuti-
liter** legabatur: **est autem alienus postumus, qui natus inter
suos heredes testatoris futurus non est: ideoque ex eman-
cipato filio conceptus nepos extraneus** erat **postumus** avo.
27 Sed nec huiusmodi species penitus est sine iusta emendatione
derelicta, cum in nostro codice constitutio posita est, per
quam et huic parti medevimus non solum in hereditatibus, sed
etiam in legatis et fideicommissis: quod evidenter ex ipsius
constitutionis lectione clarescit. tutor autem nec per nostram
constitutionem incertus dari debeat, quia certo iudicio debet
28 quis pro tutela suae posteritati cavere. **Postumus autem**
Cf. G. ii. 242, 287. **alienus heres institui** et antea poterat et nunc potest, nisi in

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§ 25. For incertae personae and testamenti factio see Gaius ii. 238–240, and note on Tit. 14 pr. supr.; for the validity of fideicommissa to incertae personae, note (3) on Tit. 23. 1 inf.

§§ 26, 27. For legacy to postumi alieni see Gaius ii. 241 and note on Tit. 14 pr. supr. The constitution by which Justinian altered the law is not in the Code which has come down to us, but there is a statement of its contents in the abstract of the Basilica made by one Tipucitus.

§ 28. What Justinian says as to the possibility of instituting a postumus alienus before his own time refers (as is clear from Bk. iii. 9 pr. inf.) not to the validity of such institution iure civili, but to the resulting bonorum possessio: cf. Gaius ii. 242. 287. For the latter part of the section cf.

utero eius sit, quae iure nostra uxor esse non potest. Si quid **29**
in nomine cognomine praenomine legatarii erraverit testator, si de persona constat, nihilo minus valet legatum: idem in heredibus servatur et recte: nomina enim significandorum hominum gratia reperta sunt, qui si quolibet alio modo intellegantur, nihil interest. Huic proxima est illa iuris regula **30**
falsa demonstratione legatum non peremi. veluti si quis ita legaverit 'Stichum servum meum vernam do lego:' licet enim non verna, sed emptus sit, de servo tamen constat, utile est legatum. et convenientur si ita demonstraverit 'Stichum servum, quem a Seio emi', sitque ab alio emptus, utile legatum

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Gaius ii. 141 'item qui in utero eius est quae connubio non interveniente ducta est uxor extraneus postumus patri contingit' and Dig. 28. 2. 9. 1 'sed si ex ea, quae alii nupta sit, postumum quis heredem instituerit, ipso iure non valet, quod turpis sit institutio', ib. 4 'sed si per adoptionem sororem factam habeam, potero postumum ex ea heredem instituere, quia adoptione soluta possum eam ducere uxorem'.

§ **29**. Mistake is of two kinds: it may exist either in forming an intention, or in expressing one already genuinely formed. In this and the next section Justinian is speaking of the latter. An error in a name, si de persona constat, does not affect the validity of a testamentary disposition, 'rerum enim vocabula immutabilia sunt, hominum mutabilia' Dig. 30. 4 pr. Again, if a testator expressed a different quantity from what he intended, the expression must yield to the intention, Dig. 28. 5. 9. 2–4; 30. 15: and if he inserted a condition which he never intended, it was taken pro non scripto, but a disposition which in form is absolute, but which the testator intended to make conditional, is void, Dig. 28. 5. 9. 5.

A disposition made under a mistake, or in ignorance of certain facts (the first kind of mistake above mentioned) as a rule has all the effect which it would have had, had there been no mistake at all. In wills, however, this rule is reversed, and the disposition is void. Thus, if a testator institutes or gives a legacy to a person whom he erroneously believes to be his son or brother, the institution or legacy is invalid, Cod. 6. 23. 5; 6. 24. 4: so too if he institutes an extraneus supposing that he has no children of his own, Dig. 5. 2. 28, or executes a second will under the impression that the person instituted in the first is dead, Dig. 28. 5. 92. According to this rule, the master of the instituted slave in Tit. 15. 4 supr. would be entitled to nothing, but the decision of Tiberius, though quite opposed to principle, is to be excused as a rough and ready attempt to adjust a conflict between equitable and strictly legal claims. The inconsistency between §§ 4 and 11 has been pointed out in the note on the latter.

§ **30**. 'Quicquid demonstratae rei additur satis demonstratae, frustra est' Dig. 33. 4. 1. 8, the reason being that 'demonstratio plerumque vice nominis fungitur' Dig. 35. 1. 34.

31 est, si de servo constat. Longe magis legato falsa causa non nocet. veluti cum ita quis dixerit: 'Titio, quia absente me negotia mea curavit, Stichum do lego,' vel ita: 'Titio, quia patrocinio eius capitali crimine liberatus sum, Stichum do lego:' licet enim neque negotia testatoris umquam gessit Titius neque patrocinio eius liberatus est, legatum tamen valet. sed si condicionaliter enuntiata fuerit causa, aliud iuris est, veluti hoc modo: 'Titio, si negotia mea curaverit,
G.ii.244. 32 fundum do lego.' **An** servo heredis **recte legamus, quaeritur.** et constat **pure** inutiliter **legari** nec quidquam proficere, si **vivo testatore** de **potestate heredis** exierit, **quia quod** inutile **foret** legatum, **si statim post factum testamentum decessisset testator, hoc** non debet **ideo valere, quia** diutius testator vixerit. **sub condicione** vero **recte** legatur, ut requiramus, an, quo
G.ii.245. 33 tempore dies legati cedit, in potestate heredis non sit. **Ex diverso herede instituto** servo quin domino **recte** etiam sine

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§ 31. The general rule is that a testamentary disposition is void if the testator's motive in making it is a mistaken one, e. g. if he erroneously supposes the institutus or legatee to have saved his life, to be his agent, etc.: and it is only apparently that this is contradicted by the maxim falsa causa non nocet. All that the latter means is that an institution or legacy is not avoided by the mere fact that the testator states a motive for his disposition which is unreal: to avoid it it must also be proved that he believed it to be real: 'falsam causam legato non obesse verius est, quia ratio legandi legato non cohaeret: sed plerumque doli exceptio locum habebit, si probetur alias legaturus non fuisse' Dig. 35. 1. 72. 6; cf. Cod. 6. 44. 1.

§ 32. This distinction between a legacy given pure, and sub condicione to a slave of the institutus had been supported by the Sabinians: the Proculians held it void in either case: Servius maintained that the bequest was provisionally valid, whether conditional or not, but became void if the legatee was in the institutus' power on the dies legati cedens, Gaius ii. 244. The Proculian view was based upon what is called the regula Catoniana, because it was ascribed to one of the Catos, probably the younger: 'regula Catoniana sic definit; quod, si testamenti facti tempore decessisset testator, inutile foret, id legatum, quandocunque decesserit, non valere' Dig. 34. 7. 1. But this rule did not apply to conditional legacies, whose validity was tested at the fulfilment of the condition, Dig. 35. 1. 98, or to those which were given ex die: 'Catoniana regula non pertinet ad ea legata, quorum dies non mortis tempore, sed post aditam cedit hereditatem' Dig. 34. 7. 3.

§ 33. The reason of the distinction between this case and that discussed in § 32 is that here, if the testator had died immediately after making

condicione **legetur**, non dubitatur. nam et si statim post factum testamentum decesserit testator, non tamen apud eum qui heres sit dies legati cedere intellegitur, cum hereditas a legato separata sit et possit per eum servum alius heres effici, si prius, quam iussu domini adeat, **in** alterius potestatem **translatus** sit, vel **manumissus ipse heres** efficitur: quibus casibus utile est **legatum**: quodsi in eadem causa permanserit et iussu legatarii adierit, evanescit legatum. **Ante heredis** 34 G. ii. 229.
institutionem inutiliter antea legabatur, **scilicet quia testamenta vim ex institutione heredum accipiunt et ob id veluti caput atque fundamentum intellegitur totius testamenti heredis institutio. pari ratione nec libertas ante heredis institu-** G. ii. 230.
tionem dari poterat. sed quia incivile esse putavimus ordinem quidem scripturae sequi (quod et ipsi antiquitati vituperandum fuerat visum), sperni autem testatoris voluntatem: per nostram constitutionem et hoc vitium emendavimus, ut liceat et ante heredis institutionem et inter medias heredum institutiones legatum relinquere et multo magis libertatem, cuius usus favorabilior est. **Post mortem quoque heredis** aut legatarii 35 G. ii. 232.
simili modo **inutiliter** legabatur: veluti si quis ita dicat: '**cum heres meus mortuus erit, do lego**:' item '**pridie quam heres** aut legatarius **morietur**'. sed simili modo et hoc correximus firmitatem huiusmodi legatis ad fideicommissorum similitudinem praestantes, ne vel in hoc casu deterior causa legatorum

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the will, the legacy would have belonged to the master, but the inheritance might have gone to some one else, if the slave had changed his master between the death and aditio.

§ 34. Cod. 6. 23. 24: see note on Tit. 14 pr. supr. ad init. The words 'quod et ipsi antiquitati vituperandum fuerat visum' relate to the whole sentence, 'ordinem scripturae sequi, sperni autem testatoris voluntatem.'

§ 35. Gaius says (ii. 232) that a legacy 'cum heres meus morietur' was valid, but one 'cum heres meus mortuus erit' or 'pridie quam heres meus morietur' was void: a distinction, he adds, 'quod non pretiosa ratione receptum videtur.' The ground of the rule was 'ne ab heredis herede legari videatur, quod iuris civilis ratio non patitur' Ulpian, Reg. 24. 16, cf. Paul. Sent. Rec. 3. 6. 5, which itself was only an application of the larger principle 'inelegans visum, ex heredis persona incipere obligationem' Gaius iii. 100; see on Bk. iii. 19. 13 inf. A fideicommissum was valid in any of the three forms given above, Gaius ii. 277, Ulpian, Reg. 25. 8. Justinian's enactments on the subject are in Cod. 4. 11. 1; 8. 38. 11.

G.ii.235. 36 quam fideicommissorum inveniatur. **Poenae quoque nomine inutiliter** legabatur et adimebatur vel transferebatur. **poenae autem nomine legari videtur, quod coercendi heredis causa relinquitur, quo magis is aliquid faciat aut non faciat: velut** si quis **ita** scripserit: '**heres meus si filiam suam in matrimonium Titio collocaverit**' (**vel** ex diverso '**si non collocaverit**'), '**dato** decem aureos Seio,' aut si ita scripserit 'heres meus si servum Stichum alienaverit' (vel ex diverso 'si non alienaverit'), 'Titio decem aureos dato.' et in tantum haec regula observabatur, ut perquam pluribus principalibus constitutionibus significetur nec principem quidem agnoscere, quod ei poenae nomine legatum sit. nec ex militis quidem testamento talia legata valebant, quamvis aliae militum voluntates in ordinandis testamentis valde observantur. quin etiam **nec**
G. ii. 236. **libertatem poenae nomine dari posse** placebat. eo amplius
G. ii. 243. nec **heredem poenae nomine** adici posse Sabinus existimabat, veluti si quis ita dicat: 'Titius heres esto: si Titius filiam suam Seio in matrimonium collocaverit, Seius quoque heres esto:' **nihil enim** intererat, qua ratione Titius coerceatur, **utrum legati datione an coheredis adiectione.** at huiusmodi scrupulositas nobis non placuit et generaliter ea quae relinquuntur, licet poenae nomine fuerint relicta vel adempta vel in alios translata, nihil distare a ceteris legatis constituimus vel in dando vel in adimendo vel in transferendo: exceptis his videlicet, quae impossibilia sunt vel legibus interdicta aut alias probrosa: huiusmodi enim testatorum dispositiones valere secta temporum meorum non patitur.

XXI

DE ADEMPTIONE LEGATORUM ET TRANSLATIONE

Ademptio legatorum, sive eodem testamento adimantur sive codicillis, firma est, sive contrariis verbis fiat ademptio,

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§ **36**. Some conditional legacies are difficult to distinguish from legacies poenae nomine, viz. those in which the fulfilment of the condition depends on the legatee himself. These, however, were not necessarily treated as penal under the old law: the test was the intention of the testator ('poenam a condicione voluntas testatoris separat, et an poena, an condicio sit ex voluntate defuncti apparet' Dig. 34. 6. 2); unless it appeared that the testator designed the legacy as a means of compulsion, it was valid.

Tit. XXI. For codicilli see Tit. 25 and notes inf. Besides the modes

veluti si, quod ita quis legaverit 'do lego', ita adimatur 'non do non lego', sive non contrariis, id est aliis quibuscumque verbis. Transferri quoque legatum ab alio ad alium potest, 1
veluti si quis ita dixerit: 'hominem Stichum, quem Titio legavi, Seio do lego,' sive in eodem testamento sive in codicillis hoc fecerit: quo casu simul Titio adimi videtur et Seio dari.

XXII

DE LEGE FALCIDIA

Superest, ut de lege Falcidia dispiciamus, qua modus G. ii. 224.
novissime legatis impositus est. cum enim **olim** lege **duodecim tabularum** libera erat legandi potestas, ut **liceret vel totum patrimonium legatis erogare** (quippe ea lege ita cautum esset: **uti legassit suae rei, ita ius esto**): visum est hanc legandi licentiam coartare, idque ipsorum testatorum gratia provisum est ob id, quod **plerumque intestati moriebantur,**

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mentioned in the text, a legacy might be taken away by erasing the disposition from the will, Dig. 34. 4. 16 and 17, or tacitly by any act from which it could be gathered that the testator no longer wished the legatee to have the bequest, e. g. by alienation of the res legata, Tit. 20. 12 supr., Dig. 34. 4. 15, and a legacy was even held to be revoked if the relations between the parties became such that a continuance of the testator's benevolent intention could not be presumed, e. g. if a serious enmity arose between them, Dig. 34. 4. 3. 11. Under the older law contraria verba had been required for an express ademption, 'dum tamen eodem modo adimatur, quo modo datum est' Ulpian, Reg. 24. 29.

§ 1. 'Translatio legati fit quattuor modis: aut enim a persona in personam transfertur: aut ab eo, qui dare iussus est, transfertur ut alius det: aut cum res pro re datur, ut pro fundo decem aurei: aut quod pure datum est, transfertur sub condicione' Dig. 34. 4. 6 pr.

Tit. XXII. For the well-known enactment of the Twelve Tables here quoted cf. Cic. de Inv. 2. 50, 148, Auctor ad Herenn. 1. 13. 23, Dig. 50. 16. 120, Ulpian, Reg. 11. 14; its content is pithily put by Gaius ii. 224 'quod quisque de re sua testatus esset, id ratum haberetur'. But the heir was not bound to pay legacies in excess of the net inheritance: Dig. 36. 1. 1. 17.

The lex Furia testamentaria, the date of which is unknown, but which must have been enacted before the lex Voconia, Gaius ii. 226, and probably after the lex Cincia, B.C. 204, from which it seems to have derived its classes of exceptae personae, imposed a penalty of four times the excess upon any one (except the cognates within certain degrees, Fragm. Vat. 301, or the cognates of the person by whom the testator had been emancipated or manumitted, Ulpian, Reg. 28. 7) who took as a legacy,

recusantibus scriptis heredibus pro nullo aut minimo lucro
G. ii. 225. hereditates adire. et cum super hoc tam **lex Furia** quam **lex**
G. ii. 226. **Voconia latae** sunt, quarum neutra sufficiens ad rei con-
G. ii. 227. summationem videbatur: novissime **lata est lex Falcidia, qua cavetur, ne plus legare liceat, quam dodrantem** totorum bonorum, id est ut, sive unus heres institutus esset sive plures,
1 apud eum eosve **pars quarta** remaneret. Et cum quaesitum esset, duobus heredibus institutis, veluti Titio et Seio, si Titii pars aut tota exhausta sit legatis, quae nominatim ab eo data sunt, aut supra modum onerata, a Seio vero aut nulla

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or mortis causa, more than 1000 asses from the same person. As Gaius remarks, it altogether failed in its object, 'qui enim verbi gratia quinque millium aeris patrimonium habebat, poterat quinque hominibus singulis millenos asses legando totum patrimonium erogare' ii. 225. The lex Voconia, B. C. 169 (Cic. de Fin. 2. 17: in Verr. 1. 43), one provision of which has been already noticed on p. 265 supr., enacted (Gaius ii. 226) that no one should take more by way of legacy or donatio mortis causa than the heir or heirs jointly. Thus a person possessing 100,000 asses or upwards could leave a woman half his property as a legacy, though he could not institute her his heir: and this perhaps was the origin of legata partitionis (see on Tit. 23. 4–6 inf.). The enactment was equally a failure, for, as Gaius says, 'in multas legatariorum personas distributo patrimonio, poterat adeo heredi minimum relinquere [testator] ut non expediret heredi, huius lucri gratia, totius hereditatis onera sustinere.' Both statutes were superseded by the lex Falcidia, B. C. 40, the terms of which ran as follows, 'quicunque civis Romanus post hanc legem rogatam testamentum faciet, is quantam cuique civi Romano pecuniam iure publico dare legare volet, ius potestasque esto, dum ita detur legatum, ne minus quam partem quartam hereditatis eo testamento heredes capiant' Dig. 35. 2. 1 pr. The provisions of the lex Falcidia were not extended to donationes mortis causa till the time of Septimius Severus, Dig. 24. 1. 32. 1: 31. 77. 1.

§ 1. The maxim 'in singulis heredibus ratio legis Falcidiae ponenda est' can best be explained by an illustration. A leaves a property of 800*l.* between B and C as co-heredes. He charges B with legacies to the extent of 350*l.*: C he leaves comparatively free. The legatees argue that their legacies ought to be paid in full, for even so the heirs between them will get far more than a fourth of the whole inheritance. B argues that they ought not, for else he will not get a clear fourth, but only an eighth, of his own share. B's argument prevails, each heir being entitled separately to claim the Falcidian fourth on his share of the inheritance, even though the legatees collectively thus get less than the three-fourths to which they are apparently entitled under the statute.

If B had refused to accept, C would by accrual have had two distinct shares in the same inheritance, and as this might happen in other ways, it is important to determine how the Falcidian fourth is calculated, if

relicta sint legata, aut quae partem eius dumtaxat in partem dimidiam minuunt, an, quia is quartam partem totius hereditatis aut amplius habet, Titio nihil ex legatis, quae ab eo relicta sunt, retinere liceret: placuit retinere licere, ut quartam partem suae partis salvam habeat: etenim in singulis heredibus ratio legis Falcidiae ponenda est. Quantitas autem 2
patrimonii, ad quam ratio legis Falcidiae redigitur, mortis tempore spectatur. itaque si verbi gratia is, qui centum aureorum patrimonium habebat, centum aureos legaverit, nihil legatariis prodest, si ante aditam hereditatem per servos hereditarios aut ex partu ancillarum hereditariarum aut ex fetu pecorum tantum accesserit hereditati, ut centum aureis

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necessary, in such cases. Three different modes of such calculation are found in the authorities. (1) The several shares in the inheritance, and the legacies charged upon them respectively, are taken in the aggregate, and a fourth deducted from that aggregate only. (2) The several shares are regarded as still belonging to different heirs, and the maxim stated in this section is applied to them severally. (3) They are still kept separate, and the fourth is calculated on each share by itself: but the excess on some shares is allowed to benefit the legatees whose bequests are charged on others, but not vice versa. This is the principle applied in the case of accrual between B and C supposed; the legatees whose bequests are charged on the heir who takes (C) are benefited by the surplus (if there be one) on the share of the heir who refuses, but not conversely, 'quod si alterutro eorum deficiente alter heres solus extiterit, utrum perinde ratio legis Falcidiae habenda sit, ac si statim ab initio is solus heres institutus esset, an singularum portionum separatim causae spectandae sunt? et placet, si eius pars legatis exhausta sit, qui heres extiterit, adiuvari legatarios per deficientem partem . . . si vero defecta pars fuerit exhausta, perinde in ea ponendam rationem legis Falcidiae, atque si ad eum ipsum pertineret, a quo defecta fieret' Dig. 35. 2. 78. We find the same system in cases of substitution. The first method of calculating the fourth is found pure and simple only where the same heir is instituted to different shares ('ex variis portionibus' Dig. 35. 2. 11. 7) in the same inheritance, though we often see it in combination with the second (as in the case of accrual); the second applies by itself where one of two co-heirs becomes heir to, or otherwise entitled to the share of, the other after acceptance, 'si coheredem meum post aditam hereditatem adrogavero, non dubitatur quin separandae sint portiones, perinde atque si coheredi meo heres extitissem' Dig. 35. 2. 1. 15.

§ 2. The mode in which the fourth was ascertained was as follows. Immediately on the testator's decease, the inheritance was valued: after deducting the costs and charges specified in section 3, three-fourths of the residue is set apart for the legatees, who, if any one accepts under the will, can claim this, whatever happens, unless indeed they agree to take

legatorum nomine erogatis heres quartam partem hereditatis habiturus sit, sed necesse est ut nihilo minus quarta pars legatis detrahatur. ex diverso si septuaginta quinque legaverit et ante aditam hereditatem in tantum decreverint bona incendiis forte aut naufragiis aut morte servorum, ut non amplius quam septuaginta quinque aureorum substantia vel etiam minus relinquatur, solida legata debentur. nec ea res damnosa est heredi, cui liberum est non adire hereditatem: quae res efficit, ut necesse sit legatariis, ne destituto testamento nihil consequantur, cum herede in portione pacisci.
3 Cum autem ratio legis Falcidiae ponitur, ante deducitur aes

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less: but under no circumstances can they demand more. What remains is reserved for the heir, whether its amount is increased or diminished between the testator's decease, and acceptance by him.

For instance, after deducting the costs and charges referred to, the inheritance is valued at 1200*l.* The legacies charged on the heir amount to 1150*l.*, but all that the legatees can get is 900*l.*, even if subsequently and before aditio the inheritance doubles in value, e. g. by a servus hereditarius being instituted heir to a rich deceased, or in any other manner whatsoever. The only person benefited by this is the heir: instead of 300*l.*, his share at the testator's decease, he gets (under the circumstances supposed) 1500*l.*, and yet the legatees cannot claim more than 900*l.*, because their rights are fixed at the date of death.

In the converse case of the inheritance seriously falling in value after that date, the heir (as is remarked in the text) need not accept, and naturally will not, if his share has dwindled so much as to be no compensation for the trouble and risk of administration: but if he does not accept (supposing no substitutus does either) intestate succession will take the place of the will, and the legacies will fall to the ground: it will consequently be the legatees' interest to abate their claims so far as to make aditio not unprofitable to the institutus.

In valuing the inheritance, all its debtors who were not known to be bankrupt were regarded as solvent, though only to the extent that they could pay: 'cuius debitor non solvendo est, tantum habet in bonis quantum exigere potest' Dig. 35. 2. 63. 1, so that if any subsequently became insolvent the loss fell on the heir: 'in ratione legis Falcidiae . . . debitorum facta peiora nomina . . . heredi pereunt' Dig. ib. 30 pr. In the opposite case the rule was inconsistent: if bankrupt debtors subsequently acquired property, the legatees were so much the better off, Dig. ib. 56. 1.

The heir was entitled to his fourth *as* heir: whatever else he got from the testator, by legacy, fideicommissum, or donatio mortis causa, was not included in it, unless the testator directed otherwise, Dig. ib. 29; ib. 74; ib. 91.

§ 3. Besides debts, funeral expenses, and the value of slaves whom the testator had manumitted either directly or by fideicommissum, there

alienum, item funeris impensa et pretia servorum manumissorum, tunc deinde in reliquo ita ratio habetur, ut ex eo quarta pars apud heredes remaneat, tres vero partes inter legatarios distribuantur, pro rata scilicet portione eius, quod cuique eorum legatum fuerit. itaque si fingamus quadringentos aureos legatos esse et patrimonii quantitatem, ex qua legata erogari oportet, quadringentorum esse, quarta pars singulis legatariis detrahi debet. quodsi trecentos quinquaginta legatos fingamus, octava debet detrahi. quodsi quingentos legaverit, initio quinta, deinde quarta detrahi debet: ante enim detrahendum est, quod extra bonorum quantitatem est, deinde quod ex bonis apud heredem remanere oportet.

XXIII

DE FIDEICOMMISSARIIS HEREDITATIBUS

Nunc transeamus ad fideicommissa. et prius de hereditatibus fideicommissariis **videamus.** G. ii. 246, 247.

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were deducted the costs of administration, Dig. 32. 5. 72. The heir could not claim his legitima pars (Tit. 18 supr.), Dig. 5. 2. 89, in addition to the Falcidian fourth: the Canon law altered this where he was charged with a fideicommissaria hereditas (for which see next Title). The legitima pars of those relations of the testator who could claim it was treated as a debt due from the inheritance.

The cases in which the heir could not claim the Falcidian fourth are briefly as follows. (1) Where the testament was that of a soldier executed in accordance with the rules laid down in Tit. 11 supr., Cod. 6. 21. 12. (2) When the testator explicitly denied the fourth to the heir, which Justinian enabled him to do in all cases by Nov. 1. 2. 2. (3) Where the heir renounced the right, such renunciation being presumed if he paid the legacies in full, Cod. 6. 50. 19: but no such renunciation bound the heir if made during the testator's lifetime, Dig. 32. 5. 15. 1. (4) Where the heir forfeited his right, as he did (*a*) by neglecting to make an inventory (p. 287 supr.), Cod. 6. 30. 22. 14 c, (*b*) by any attempt to defraud the legatees, Dig. 32. 5. 59 pr.: and (*c*) by accepting the inheritance only under compulsion from the legatees or fideicommissarii, Dig. 36. 1. 4: ib. 14. 4. (5) The right to deduct the fourth did not exist in respect of certain kinds of legacies, e. g. those of liberty to slaves, Dig. 35. 2. 33, of objects possessing no proper pecuniary value, such as documents of title, Cod. 6. 50. 15, legata debiti when there is no commodum repraesentationis (Tit. 20. 14 supr.), Dig. 30. 28. 1; legacies ad pias causas, Nov. 131. 12, and those which go to make up the legitima pars of persons who could bring the querella inofficiosi testamenti or the actio ad supplendam

1 Sciendum itaque est omnia fideicommissa primis temporibus infirma esse, quia nemo invitus cogebatur praestare id de quo rogatus erat: quibus enim non poterant hereditates vel legata relinquere, si relinquebant, fidei committebant eorum, qui capere ex testamento poterant: et ideo fideicommissa appellata sunt, quia nullo vinculo iuris, sed tantum pudore eorum qui rogabantur continebantur. postea primus divus Augustus semel iterumque gratia personarum motus, vel quia per ipsius salutem rogatus quis diceretur, aut ob

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legitimam, Cod. 3. 38. 36 pr.: and legacies to a wife of articles in her personal use, Dig. 35. 2. 81. 2.

Tit. XXIII. 1. Fideicommissa, which under Justinian's final legislation practically formed one institution with legacies, in origin differed from them in nearly every respect. Not being legally binding in any case on the heir or other person who was charged with them, there was nothing to be gained by inserting them in a will, so that probably they were in most cases oral or contained in codicilli (Tit. 25 inf.); this at least seems to be the natural inference from the fact that codicilli were clothed with obligatory force almost simultaneously with Augustus' intervention in favour of fideicommissa. In Cicero's time it was considered an honest man's duty to carry out fideicommissa whose object was legitimate, while those which aimed at an evasion of law were disregarded; de Fin. 2. 17 and 18. For their conversion into an 'adsidua iurisdictio' cf. Suetonius, Claud. 23 'iurisdictionem de fideicommissis quotannis et tantum in urbe delegari magistratibus solitam, in perpetuum atque etiam per provincias potestatibus demandavit'. The praetor fideicommissarius is mentioned by Gaius ii. 278, Ulpian, Reg. 25. 12, and often in the Digest.

The following are perhaps the most characteristic of the many points of difference which Gaius (ii. 269–289) mentions as originally existing between these two kinds of bequest:—

(1) A legacy could not exist apart from a will, and had to be expressed 'civilibus verbis': a fideicommissum could be imposed on intestate heirs as well as heirs under a will, and even when contained in a will might be written in Greek, Ulpian, Reg. 25. 9. Indeed, while no one could be charged with a legacy except the testamentary heir, a fideicommissum could be imposed on any one who took a benefit from the deceased upon his death, Tit. 24. 1 inf.: and though certain forms were generally employed, a mere gesture, if unmistakeable, was sufficient, Ulpian, Reg. 25. 2 and 3.

(2) A legacy created an actionable obligation (quasi ex contractu) between the heir and legatee: a fideicommissum gave rise only to a moral obligation: the deceased was said fidei committere, as opposed to directo iure relinquere. Even when fideicommissa had become an adsidua iurisdictio, they could not be sued upon by a regular action at law, which was tried by a iudex, but (if he saw fit in the particular case to enforce

insignem quorundam perfidiam iussit consulibus auctoritatem suam interponere. quod quia iustum videbatur et populare erat, paulatim conversum est in adsiduam iurisdictionem: tantusque favor eorum factus est, ut paulatim etiam praetor proprius crearetur qui fideicommissis ius diceret, quem fideicommissarium appellabant.

In primis igitur sciendum est opus esse, ut aliquis recto 2 G. ii. 248.
iure testamento **heres instituatur eiusque fidei committatur, ut eam hereditatem alii restituat: alioquin inutile est testamentum, in quo nemo heres instituitur. cum igitur aliquis** G. ii. 250.
scripserit: 'Lucius Titius heres esto,' poterit adicere: 'rogo te, Luci Titi, ut, cum primum possis hereditatem meam adire, eam Gaio Seio reddas restituas.' potest autem quisque et

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them) they were adjudicated upon by the praetor fideicommissarius in person, thus forming a branch of the extraordinaria cognitio: and it was not till Justinian's own time (Tit. 20. 2 and 3 supr.) that in respect of remedy they were placed upon precisely the same footing with legacies.

(3) To benefit by a fideicommissum the recipient need not have testamenti factio or any other kind of capacity (see Tit. 20. 24 supr.): thus one could be given to peregrini, Latini Iuniani, women who by the lex Voconia were disabled from succeeding to testators possessed of 100,000 asses or upwards, incertae personae, coelibes, and orbi. The incapacity of peregrini to take legacies is mentioned by Gaius (ii. 285) as the probable origin of fideicommissa of res singulae: that of women under the lex Voconia seems to be connected with the first cases of fideicommissaria hereditas, Cic. de Fin. 2. 17 and 18. But by the SC. Pegasianum (§ 5 inf., Gaius ii. 286) fideicommissa were subjected to the rules of the leges Iulia and Papia Poppaea respecting coelibes and orbi (p. 265 supr.), and peregrini and incertae personae were incapacitated by senatus consulta of Hadrian, Gaius ii. 285, 287.

(4) The lex Falcidia had not included fideicommissa within its scope: this was remedied by the SC. Pegasianum, § 8 inf.

§ **2**. After the passing of the SC. Trebellianum (§ 4 inf.) a fideicommissum was called a fideicommissaria hereditas if the heir was requested to transfer either the whole inheritance, or some definite fraction of it, to the intended beneficiary: this following the analogy of a genuine heirship, in which a person is heres though instituted in a very small fraction of the succession as a whole: in other words, as a man was directus heres who was instituted in only a tenth, or a fiftieth, of the inheritance, so he was regarded as heres fideicommissarius, and entitled to a fideicommissaria hereditas, if the instituted heir was requested to transfer to him some definite quota of the universal succession, see § 7 inf. Nor, as might be hastily inferred from the text, was it essential that there should be a will: a fideicommissaria hereditas could be created by a person charging

de parte restituenda heredem **rogare : et liberum est vel pure vel sub condicione relinquere fideicommissum vel ex die certo.**

G.ii.251. 3 **Restituta autem hereditate is** quidem **qui restituit nihilo minus heres permanet : is vero qui recipit hereditatem**

4 **aliquando heredis aliquando legatarii loco** habebatur. Et

G. ii. 253. in Neronis quidem **temporibus Trebellio Maximo et Annaeo Seneca consulibus senatus consultum factum est, quo cautum est, ut, si hereditas ex fideicommissi causa restituta sit,** omnes **actiones, quae iure civili heredi et in heredem competerent, ei et in eum darentur, cui ex fideicommisso restituta esset hereditas. post quod senatus consultum praetor utiles actiones ei et in eum qui recepit hereditatem quasi heredi et**

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his heredes ab intestato with the restitution of the succession either in whole or in part: 'meminisse autem oportebit de herede instituto senatum loqui : ideoque tractatum est apud Iulianum, ad intestatos locum habeat : sed est verius eoque iure utimur, ut hoc senatusconsultum ad intestatos quoque pertineat, sive legitimi sive honorarii sint successores' Dig. 36. 1. 6. 1 ; cf. § 10 inf.

§ **3**. Before the legislation mentioned in the next section, the effect of a request to the heres to transfer to some other person the hereditas or some definite fraction of it had not been to produce a universal succession in the proper sense of the term. The transfer was at that time effected under the guise of a sale at a nominal price ('nummo uno' Gaius ii. 252), and the heir under the will (heres fiduciarius), and the transferee entered into a contract by reciprocal stipulations (stipulationes quasi emptae et venditae hereditatis) ; the former bargaining that he should be indemnified, in proportion to the quota of the hereditas which he transferred, against all judgments, legal expenses, etc. incurred by him as heir, the latter, that the other should hand over to him his due share of the present or subsequent assets, and allow him if necessary to sue as his agent upon debts owed to the testator, Gaius ii. 252. In other words, the maxim semel heres semper heres was consistently adhered to: the institutus, being charged with the transfer of so large a share of the succession that otherwise it would not be worth his while to accept, considering the liabilities with which he was saddled, was only induced to do so by the transferee's expressly undertaking to bear a fair share in all debts and other expenses which he incurred as heir.

This section is wrongly placed, as it refers really to the law as it stood after the passing of the SCa. Trebellianum and Pegasianum.

§§ **4–6**. The SC. Trebellianum, enacted probably A. D. 56, was designed in order to dispense with the clumsy process of fictitious sale and the stipulations quasi emptae et venditae hereditatis which had previously been necessary. For actiones utiles see the pages referred to s. v. 'actiones directae et utiles' in the General Index. The operation of

in heredem dare coepit. Sed quia heredes scripti, cum aut totam hereditatem aut paene totam plerumque restituere rogabantur, adire hereditatem ob nullum vel minimum lucrum recusabant atque ob id extinguebantur fideicommissa: postea Vespasiani Augusti temporibus Pegaso et Pusione consulibus senatus censuit, ut ei, qui rogatus esset hereditatem restituere, perinde liceret quartam partem retinere, atque lege Falcidia ex legatis retinere conceditur. ex singulis quoque rebus, quae per fideicommissum relinquuntur, eadem retentio permissa est. post quod senatus consultum ipse heres onera hereditaria sustinebat: ille autem, qui ex fideicommisso recepit partem hereditatis, legatarii partiarii loco erat, id est eius legatarii, cui pars bonorum legabatur. quae species legati partitio vocabatur, quia cum herede legatarius partiebatur hereditatem. unde quae solebant stipulationes inter heredem et partiarium legatarium interponi, eaedem interponebantur inter eum, qui ex fideicommisso recepit hereditatem, et heredem, id est ut et lucrum et damnum hereditarium pro

5 G. ii. 254.

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the senatusconsult was much narrowed by the enactment of the SC. Pegasianum, of the date of which nothing is known with certainty except that it belongs, as Justinian says, to the reign of Vespasian, A.D. 69–79, and which (inter alia) provided (1) that fideicommissa should in future be subject to the rule which had been established for legacies by the lex Falcidia, and the heir be entitled to retain for himself a fourth of the inheritance clear of fideicommissa: (2) that where fideicommissa were charged upon an inheritance in excess of three-fourths of its value, the SC. Trebellianum should have no application. The general result after this was as follows:

(1) If the fideicommissa did not exceed three-fourths of the whole succession, the transfer of those of them which were 'hereditates' was governed by the SC. Trebellianum: the transferee became quasi-heir (as described in § 4) and could sue and be sued by utilis actio in respect of the share he took: no stipulations between him and the heres directus were required.

(2) If the fideicommissa, whether singular or universal, exceeded three-fourths of the hereditas, the only person who could sue and be sued was the heres directus, the SC. Trebellianum being excluded. Accordingly, if any of them were universal, it was necessary to go back to the old contract of indemnification: else the heir would possibly find the hereditas damnosa. The exact matter of the contract, however, as is remarked in § 6, differed according as the heir availed himself of the SC. Pegasianum, and retained his fourth, or was unable or declined to take advantage of it.

G. ii. 255. 6 rata parte inter eos commune sit. Ergo si quidem non plus quam dodrantem hereditatis scriptus heres rogatus sit restituere, tunc ex Trebelliano senatus consulto restituebatur hereditas et in utrumque actiones hereditariae pro rata parte dabantur: in heredem quidem iure civili, in eum vero qui recipiebat hereditatem ex senatus consulto Trebelliano tam-
G. ii. 256. quam in heredem. at si plus quam dodrantem vel etiam totam hereditatem restituere rogatus sit, locus erat Pegasiano
G. ii. 257. senatus consulto, et heres, qui semel adierit hereditatem, si modo sua voluntate adierit, sive retinuerit quartam partem sive noluerit retinere, ipse universa onera hereditaria sustinebat. sed quarta quidem retenta quasi partis et pro parte stipulationes interponebantur tamquam inter partiarium legatarium et heredem: si vero totam hereditatem restituerit, emptae et venditae hereditatis stipulationes interponebantur.
G. ii. 258. sed si recuset scriptus heres adire hereditatem ob id, quod dicat eam sibi suspectam esse quasi damnosam, cavetur Pegasiano senatus consulto, ut desiderante eo, cui restituere rogatus est, iussu praetoris adeat et restituat hereditatem perindeque ei et in eum qui recipit hereditatem actiones dentur, ac si iuris

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In the former case, the procedure was based upon an older institution, the legatum partitionis, by which the heres was instructed in a will to hand over to a *legatee* some definite fraction of the inheritance, e.g. 'heres meus cum Titio hereditatem partito, dividito' Ulpian, Reg. 24. 25. As, under such circumstances, instituti not unfrequently refused to accept unless guaranteed pro rata portione against creditor's claims and other expenses, it became usual for the heir and the partiary legatee to enter into a contract (stipulationes partis et pro parte), by which the latter engaged to indemnify the former against liabilities in proportion to the share which he took in the estate, and the former that he would transfer to the legatee his fair proportion of the assets. This system was adopted where the heir retained his fourth under the SC. Pegasianum. But if he did not do so, but transferred the whole hereditas, the transaction was regarded as a quasi-sale, and the contract took the form of stipulations quasi emptae et venditae hereditatis, which the SC. Trebellianum had thus dispensed with for perhaps twenty years only.

The SC. Pegasianum, having thus fully protected the heir from being unfairly burdened with fideicommissa, also disabled him, as is pointed out at the end of § 6, from disappointing the expectations of fideicommissarii by refusing to accept the inheritance on the ground that the liabilities exceeded the assets. Under such circumstances he could be compelled by the magistrate to accept and transfer, whereby he forfeited his right to the fourth: his relation to the hereditas was in fact purely

est ex Trebelliano senatus consulto: quo casu nullis stipulationibus opus est, quia simul et huic qui restituit securitas datur et actiones hereditariae ei et in eum transferuntur qui recipit **hereditatem,** utroque senatus consulto in hac specie concurrente.
Sed quia stipulationes ex senatus consulto 7
Pegasiano descendentes et ipsi antiquitati displicuerunt et quibusdam casibus captiosas eas homo excelsi ingenii Papinianus appellat et nobis in legibus magis simplicitas quam difficultas placet, ideo omnibus nobis suggestis tam similitudinibus quam differentiis utriusque senatus consulti placuit

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formal and momentary; the liabilities attached, as the rights belonged, to the transferee alone, who alone could sue the debtors, and be sued by the creditors, of the estate: see § 7 ad fin. Consequently, if after such enforced acceptance there was no one to whom the transfer could be made (e. g. if the intended transferee had died leaving no successor) the creditors could claim it themselves, Dig. 36. 1. 11. 2. If, after exercising his right of compulsion, the fideicommissarius drew back, and refused the transfer, it was taken in law to have been made (Dig. 36. 1. 44 pr.), and even though the share of the inheritance actually given to him was only a fraction, he was bound to take over, as he was entitled to claim, the whole, Dig. ib. 1. 9; ib. 16. 4. 5. This right of compulsion could never be exercised by a fideicommissarius of a res singula, or by a legatee: 'sed in fideicommissariis hereditatibus id provisum est, ut si scriptus heres nollet adire hereditatem, iussu praetoris adeat et restituat: quod beneficium his, quibus singulae res per fideicommissum relictae sunt, non magis tributum est quam legatariis' Dig. 29. 4. 17.

§ 7. Justinian combined the two senatusconsulta in one enactment: retaining those provisions of the SC. Pegasianum which gave the heir a right to a fourth of the inheritance clear of fideicommissa, and which enabled the heres fideicommissarius to compel the direct heir to make aditio: but repealing that which had suspended the operation of the SC. Trebellianum where the fideicommissa exceeded in amount three-fourths of the hereditas. Under his system, whenever a definite fraction of an inheritance is transferred under a legacy or fideicommissum, the transferee is in loco heredis, and capable of suing and being sued, in the ratio of the share which comes to him.

The right, which Justinian confers upon the heir, of recovering the fourth even after he had paid in excess to the fideicommissarius, was unknown to the older law: 'qui totam hereditatem restituit, cum quartam retinere ex Pegasiano debuisset, si non retineat, repetere eam non potest, nec enim indebitum solvisse videtur, quia plenam fidem defuncto praestare maluit' Paul. Sent. Rec. 4. 3. 4. In Gaius' time (ii. 283) if one by mistake paid more than was due under a fideicommissum, the balance could be recovered: with a legacy it was otherwise.

exploso senatus consulto Pegasiano, quod postea supervenit, omnem auctoritatem Trebelliano senatus consulto praestare, ut ex eo fideicommissariae hereditates restituantur, sive habeat heres ex voluntate testatoris quartam sive plus sive minus sive penitus nihil, ut tunc, quando vel nihil vel minus quarta apud eum remaneat, liceat ei vel quartam vel quod deest ex nostra auctoritate retinere vel repetere solutum, quasi ex Trebelliano senatus consulto pro rata portione actionibus tam in heredem quam in fideicommissarium competentibus. si vero totam hereditatem sponte restituerit, omnes hereditariae actiones fideicommissario et adversus eum competunt. sed etiam id, quod praecipuum Pegasiani senatus consulti fuerat, ut, quando recusabat heres scriptus sibi datam hereditatem adire, necessitas ei imponeretur totam hereditatem volenti fideicommissario restituere et omnes ad eum et contra eum transire actiones, et hoc transponimus ad senatus consultum Trebellianum, ut ex hoc solo et necessitas heredi imponatur, si ipso nolente adire fideicommissarius desiderat restitui sibi hereditatem, nullo nec damno nec commodo
G.ii.259. 8 apud heredem manente. **Nihil autem interest, utrum aliquis ex asse heres institutus aut totam hereditatem aut pro parte restituere rogatur, an ex parte heres institutus aut totam eam partem aut partis partem restituere rogatur : nam et hoc casu** eadem observari praecipimus, quae in totius hereditatis
9 restitutione diximus. Si quis una aliqua re deducta sive praecepta, quae quartam continet, veluti fundo vel alia re rogatus sit restituere hereditatem, simili modo ex Trebelliano

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It will be remembered that the partiary legatee was only a 'singular' successor : he became liable for the testator's debts, not ipso iure, in virtue of the transfer to him of a share of the hereditas, but only by express agreement (stipulationes partis et pro parte) with the heir. After Justinian's 'exaequatio' of legacies and fideicommissa this ceased to be so, and the partiary legatee became a universal successor just like the heres fideicommissarius. For some illustrations of the joint operation of the lex Falcidia and the law relating to fideicommissa see Poste's Gaius, pp. 281–283.

§ 9. This is called institutio ex re certa. The general rule, where a person was instituted to specific property only, was to take the limitation as pro non scripto : 'si ex fundo fuisset aliquis solus institutus, valet institutio detracta fundi mentione' Dig. 28. 5. 1. 4 ; cf. Dig. 28. 6. 41. 8 : 36. 1. 30. If, however, it was clear that the testator meant some one else

senatus consulto restitutio fiat, perinde ac si quarta parte retenta rogatus esset reliquam hereditatem restituere. sed illud interest, quod altero casu, id est cum deducta sive praecepta aliqua re restituitur hereditas, in solidum ex eo senatus consulto actiones transferuntur et res quae remanet apud heredem sine ullo onere hereditario apud eum manet quasi ex legato ei adquisita, altero vero casu, id est cum quarta parte retenta rogatus est heres restituere hereditatem et restituit, scindantur actiones et pro dodrante quidem transferantur ad fideicommissarium, pro quadrante remaneant apud heredem. quin etiam licet in una re, qua deducta aut praecepta restituere aliquis hereditatem rogatus est, maxima pars hereditatis contineatur, aeque in solidum transferuntur actiones et secum deliberare debet is, cui restituitur hereditas, an expediat sibi restitui. eadem scilicet interveniunt et si duabus pluribusve rebus deductis praeceptisve restituere hereditatem rogatus sit. sed et si certa summa deducta praeceptave, quae quartam vel etiam maximam partem hereditatis continet, rogatus sit aliquis hereditatem restituere, idem iuris est. quae diximus de eo qui ex asse heres institutus est, eadem transferimus et ad eum qui ex parte heres scriptus est.

Praeterea **intestatus** quoque **moriturus potest** rogare eum, **10** G. ii. 270.
ad quem bona sua vel legitimo iure vel honorario pertinere intellegit, ut hereditatem suam totam partemve eius aut rem aliquam, veluti fundum hominem pecuniam, alicui restituat: **cum alioquin** legata nisi ex testamento non valeant. Eum **11**
quoque, cui aliquid restituitur, potest rogare, ut id rursus alii Cf. G. ii. 271.
totum aut pro parte vel etiam aliud aliquid restituat. Et **12**

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to take the residue, the intention would be executed, as in the case of an express fideicommissum before us: or a fideicommissum would be implied in favour of the intestate heirs (Dig. 31. 69 pr.), the instituti in an earlier will (Tit. 17. 3 supr., Dig. 36. 1. 30) or the coheredes of the institutus, Dig. 28. 5. 35 pr.; ib. 78 pr.

§ **11**. It was one of the differences between legacies and fideicommissa that this could not be done by means of a legacy: 'item a legatario legari non potest, sed fideicommissum relinqui potest: quinetiam ab eo quoque cui per fideicommissum relinquimus rursus alii per fideicommissum relinquere possumus' Gaius ii. 271: cf. Tit. 24 pr. inf.

§ **12**. The enactment referred to is in Cod. 6. 42. 32. The procedure described here was not confined, as has been supposed, to the case of an

quia prima fideicommissorum cunabula a fide heredum pendent et tam nomen quam substantiam acceperunt et ideo divus Augustus ad necessitatem iuris ea detraxit: nuper et nos eundem principem superare contendentes ex facto, quod Tribonianus vir excelsus quaestor sacri palatii suggessit, constitutionem fecimus, per quam disposuimus: si testator fidei heredis sui commisit, ut vel hereditatem vel speciale fideicommissum restituat, et neque ex scriptura neque ex quinque testium numero, qui in fideicommissis legitimus esse noscitur, res possit manifestari, sed vel pauciores quam quinque vel nemo penitus testis intervenerit, tunc sive pater heredis sive alius quicumque sit, qui fidem elegit heredis et ab eo aliquid restitui voluerit, si heres perfidia tentus adimplere fidem recusat negando rem ita esse subsecutam, si fideicommissarius iusiurandum ei detulerit, cum prius ipse de calumnia iuraverit, necesse eum habere vel iusiurandum subire, quod nihil tale a testatore audivit, vel recusantem ad fideicommissi vel universitatis vel specialis solutionem coartari, ne depereat ultima voluntas testatoris fidei heredis commissa. eadem observari censuimus et si a legatario vel fideicommissario aliquid similiter relictum sit. quod si is, a quo relictum dicitur, confiteatur quidem aliquid a se relictum esse, sed ad legis suptilitatem decurrat, omnimodo cogendus est solvere.

XXIV

DE SINGULIS REBUS PER FIDEICOMMISSUM RELICTIS

G. ii 260. **Potest autem quis etiam singulas res per fideicommissum relinquere, veluti fundum hominem vestem argentum pecu-**

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oral fideicommissum *stricto sensu*: it could be appealed to when there had been any kind of communication made by the testator to the heir or other person, whether by writing or word of mouth: and by the words 'et neque ex scriptura . . . intervenerit' Justinian seems to have meant that his regulation was to apply whenever there was neither a formal will nor codicil, nor an oral declaration before five witnesses: the heir had to swear *ὡς οὐ κατελείφθη φιδεικόμμισσον* Theoph. For calumnia in the sense of groundless or vexatious litigation see Bk. iv. 16. 1 inf.

Tit. XXIV. As has been observed above, a fideicommissum could be charged on any one who took a benefit by the decease: i. e. on heirs, testamentary or intestate, legatees, fideicommissarii, donees mortis causa

niam numeratam, et vel ipsum heredem rogare, ut alicui restituat, vel legatarium, quamvis a legatario legari non possit. Potest autem non solum proprias testator res per 1 G. ii. 261.
fideicommissum relinquere, sed et heredis aut legatarii aut fideicommissarii aut cuiuslibet alterius. itaque et legatarius et fideicommissarius non solum de ea re rogari potest, ut eam alicui restituat, quae ei relicta sit, sed etiam de alia, sive ipsius sive aliena sit. hoc solum observandum est, ne plus quisquam rogetur alicui restituere, quam ipse ex testamento ceperit: nam quod amplius est, inutiliter relinquitur. cum G. ii. 262.
autem aliena res per fideicommissum relinquitur, necesse est ei qui rogatus est aut ipsam redimere et praestare aut aestimationem eius solvere. Libertas quoque servo per fideicom- 2 G. ii. 263.
missum dari potest, ut heres eum rogetur manumittere vel legatarius vel fideicommissarius. nec interest, utrum de suo G. ii. 264.
proprio servo testator roget, an de eo qui ipsius heredis aut legatarii vel etiam extranei sit. itaque alienus servus redimi G. ii. 265.
et manumitti debet: quod si dominus eum non vendat, si modo nihil ex iudicio eius qui reliquit libertatem percepit, non statim extinguitur fideicommissaria libertas, sed differtur,

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(Dig. 32. 3. 3; 31. 77. 1), the fiscus, if the estate came to it as bona vacantia (Dig. 30. 114. 2), the heirs of all these persons (Dig. 32. 5. 1: ib. 6 pr.), and the father of a filiusfamilias, or master of a slave, who was instituted or to whom a legacy or fideicommissum was given.

§ 1. Cf. Ulpian, Reg. 25. 5 'per fideicommissum relinqui possunt, quae per damnationem legari'. The rule 'ne plus quisquam rogetur alicui restituere quam ipse ex testamento ceperit', and the inference from it that a beneficiary may be charged with fideicommissa to the same extent to which he is benefited, each admit of an exception: (1) 'si pecunia accepta rogatus sit rem propriam, quamquam maioris pretii est, restituere, non est audiendus legatarius, legato percepto si velit computare' Dig. 31. 70. 1: cf. the same principle applied to the manumission of the legatee's or fideicommissarius' slave in Dig. 40. 5. 24. 12. Similarly if liberty was bequeathed to a servus alienus the master could not refuse to sell or manumit him if he had taken any benefit by the testator's decease, Cod. 6. 50. 13, Dig. 40. 5. 19. 1. (2) No fideicommissum could be validly imposed on the 'legitima pars', Cod. 3. 28. 32; ib. 39 pr. and 1.

§ 2. See preceding note. In Gaius' time the refusal of the master to sell a slave to whom a testator had bequeathed freedom by a fideicommissum had been fatal to the disposition: 'si dominus eum non vendat, sane extinguitur libertas, quia pro libertate pretii computatio nulla intervenit' ii. 265.

quia possit tempore procedente, ubicumque occasio redimendi
G. ii. 266. servi fuerit, praestari libertas. **qui autem ex causa fideicommissi manumittitur, non testatoris fit libertus, etiamsi testatoris**
G. ii. 267. **servus sit, sed eius qui manumittit : at is, qui directo testamento liber esse iubetur, ipsius testatoris fit libertus,** qui etiam orcinus appellatur. **nec alius ullus directo ex testamento libertatem habere potest, quam qui utroque tempore testatoris fuerit, et quo faceret testamentum et quo moreretur.** directo autem libertas tunc dari videtur, cum non ab alio servum manumitti rogat, sed velut ex suo testamento libertatem ei competere vult.
3 Verba autem fideicommissorum haec maxime in usu habeantur: peto, rogo, volo, mando, fidei tuae committo. quae perinde singula firma sunt, atque si omnia in unum congesta essent.

XXV

DE CODICILLIS

Ante Augusti tempora constat ius codicillorum non fuisse, sed primus Lucius Lentulus, ex cuius persona etiam fideicommissa coeperunt, codicillos introduxit. nam cum decederet in Africa, scripsit codicillos testamento confirmatos, quibus ab Augusto petiit per fideicommissum, ut faceret aliquid : et cum divus Augustus voluntatem eius implesset, deinceps reliqui auctoritatem eius secuti fideicommissa prae-

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Tit. XXV. When first recognised as binding under Augustus, codicilli were informal documents in the nature of notes or memoranda containing directions from the deceased to his heir, and employed principally for the creation of fideicommissa—*ἐλλιποῦς ἐν διαθήκῃ γνώμης ἀναπλήρωσις* Theoph. Traces of this original formlessness even survive in the Digest, e. g. 29. 7. 6. 1; 31. 89 pr.: cf. Cod. 6. 42. 22. As soon, however, as they acquired legal force, it became possible to do by codicilli much which hitherto had required a testament: the result being, as Mr. Poste remarks, the practical abolition of what had till then been an unbending rule of testamentary law, viz. the requirement of unity in the act of testation. Before this, no disposition of property to take effect after one's death, apart from donationes mortis causa, had been valid unless the whole of it were made uno contextu, uno eodemque tempore: but a man 'might now distribute his fortune in a series of fragmentary or piecemeal and unrelated dispositions'. It is in this that the legal advance marked by the recognition of codicilli consists, not in their freedom from form, which was corrected by later enactments.

stabant et filia Lentuli legata, quae iure non debebat, solvit, dicitur Augustus convocasse prudentes, inter quos Trebatium quoque, cuius tunc auctoritas maxima erat, et quaesisse, an possit hoc recipi nec absonans a iuris ratione codicillorum usus esset: et Trebatium suasisse Augusto, quod diceret utilissimum et necessarium hoc civibus esse propter magnas et longas peregrinationes, quae apud veteres fuissent, ubi, si quis testamentum facere non posset, tamen codicillos posset. post quae tempora cum et Labeo codicillos fecisset, iam nemini dubium erat, quin codicilli iure optimo admitterentur.

Non tantum autem testamento facto potest quis codicillos 1 facere, sed et intestatus quis decedens fideicommittere codicillis potest. sed cum ante testamentum factum codicilli facti erant, Papinianus ait non aliter vires habere quam si speciali postea voluntate confirmentur. sed divi Severus et Antoninus rescripserunt ex his codicillis qui testamentum

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§ 1. Intestate codicilli 'nihil desiderant, sed vicem testamenti exhibent' Dig. 29. 7. 16. Those which accompany a will are merely accessory to the latter, with which they stand or fall ('codicilli . . . . testamento facto ius sequuntur eius' Dig. loc. cit., 'si ex testamento hereditas adita non fuisset, fideicommissum ex huiusmodi codicillis nullius momenti erit' ib. 3. 2), and as a general rule are read as part of the will itself: 'codicillorum ius singulare est, ut, quaecunque in his scribentur, perinde haberentur ac si in testamento scripta essent' Dig. ib. 2. 2. Occasionally, however, the codicilli are looked at by themselves, and apart from the will: e.g. if the testator is insolvent, or less than twenty years of age, at the time of executing his will, and then subsequently, when solvent or over that age, manumit a slave by codicilli, the manumission holds good, though it would have been invalid if made in the will, Dig. 29. 7. 4, ib. 1.

There were at one time important differences in effect among codicils according as they were or were not confirmed, antecedently or subsequently, by a will. By unconfirmed codicils fideicommissa alone could be created: by codicilli confirmati the testator could give legacies (Gaius ii. 270, Ulpian, Reg. 25. 8), appoint testamentary guardians, Dig. 26. 2. 3 pr., and directly manumit his own slaves: but under Justinian little remained of these distinctions excepting that relating to tutoris datio.

It was usual for wills to contain a 'clausula codicillaris', by which the testator declared his desire, that if the will should prove invalid on any ground it should have force as codicilli. Such declaration might be in any form, and need not even mention the word codicils: 'ex his verbis, quae paterfamilias scripturae addidit: ταύτην τὴν διαθήκην βούλομαι εἶναι κυρίαν ἐπὶ πάσης ἐξουσίας, videri eum voluisse omnimodo valere ea quae reliquit, etiamsi intestatus decessisset' Dig. 28. 1. 29. 1. By this clause

praecedunt posse fideicommissum peti, si appareat eum, qui postea testamentum fecerat, a voluntate quam codicillis ex-
2 presserat non recessisse. Codicillis autem hereditas neque dari neque adimi potest, ne confundatur ius testamentorum et codicillorum, et ideo nec exheredatio scribi. directo autem hereditas codicillis neque dari neque adimi potest: nam per fideicommissum hereditas codicillis iure relinquitur. nec condicionem heredi instituto codicillis adicere neque substituere
3 directo potest. Codicillos autem etiam plures quis facere potest: et nullam sollemnitatem ordinationis desiderant.

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the dispositions of the will were validated only so far as they would have held good had they been originally executed as codicilli: thus they fell to the ground unless the forms required for the execution of codicils (3 inf.) were observed, or if the testator had not testamenti factio: 'sciendum est eos demum fideicommissum posse relinquere, qui testandi ius habent' Dig. 30. 2. Subject to this, the effect of the clausula was to convert the institution of the will into a fideicommissaria hereditas, Dig. 31. 88. 17, binding on the intestate heirs, or those instituted in an earlier or later testament. If, however, the ground of the will's invalidity was violation of the rules relating to the legitima pars, the institution became altogether void. The legacies and fideicommissa remained good in any case.

§ 2. Nothing can be done by codicils affecting the direct universal succession. To what is said in the text it may be added, that no invalid institution could be validated by a codicillary confirmation, however express, Dig. 29. 7. 2. 4; though such confirmation, and also pupillary substitutions made by codicils, would be upheld by a 'benignior interpretatio' as fideicommissa, Dig. loc. cit.; 36. 1. 76. So too the heir's name, which the testator had omitted or suppressed in a will, might be supplied in later codicilli, Dig. 28. 5. 77: and in the same way a testator might declare the institutus of an earlier will indignus, whereby his portion was forfeited to the fiscus, Cod. 6. 35. 4. Soldiers were exempted from the restrictions of this section, Dig. 29. 1. 36 pr.

§ 3. The statement of the text that codicilli were subject to no requirements of form is misleading: all that it means is that they could be expressed in any phrase or language. Constantine prescribed for intestate, and Theodosius II for all codicils the same number and qualification of witnesses as were necessary for a testament. Under Justinian they had to be signed by the maker before at least five witnesses, Cod. 6. 23. 28. 6, and to be signed and sealed by the latter in his presence: many writers, however, hold that sealing was unnecessary. If these formalities were not complied with, the procedure described in Tit. 23. 12 supr. might still be appealed to, so far as the would-be codicils could be construed as creating a fideicommissum.

EXCURSUS II

IURA IN RE ALIENA OTHER THAN SERVITUDES

SUPERFICIES is a right in rem (Dig. 43. 18. 1. 3) of praetorian origin to a building or part of one, either in perpetuity or for a very extended term, without any right to the soil upon which it stands: it is a ius in re aliena because 'superficies solo cedit'; the house is properly owned by the owner of the soil: 'superficiarias aedes appellamus, quae in conducto solo positae sunt, quarum proprietas et civili et naturali iure eius est, cuius et solum,' Dig. 43. 18. 2. The modes in which it could arise are—(1) contract, whether it took the form of gift, exchange, sale (Dig. 43. 18. 1. 1), hire (the annual rent being called solarium), or permissive building upon land of the state (Dig. 43. 18. 2. 17), or a private person, Dig. 43. 18. 1 pr.; ib. 1. 4: (2) legacy; (3) judicial decree. Whether it could be acquired by usucapio is much disputed: see Dig. 6. 2. 12. 3; 41. 3. 26. Superficies was alienable inter vivos or by will (Dig. 43. 18. 1. 7), was heritable (Dig. 10. 2. 10), and could be made the subject of a pledge or servitude, Dig. 13. 7. 16. 2; 43. 18. 1. 6 and 9. For the protection of his right the superficiarius could bring in their 'utilis' form all the actions available to the dominus—rei vindicatio, negatoria, confessoria, and Publiciana, Dig. ib. 1. 1. 3 and 9, Dig. 6. 1. 73. 1; and he had a special interdict de superficie (Dig. 43. 18. 1. 2) analogous in operation to uti possidetis. Of the building itself the superficiarius had only detention: of his right he had quasi-possession, and consequently could bring directly the interdicts unde vi, Dig. 43. 16. 1. 5, and de precario, Dig. 43. 26. 2. 3.

The origin of Emphyteusis may perhaps be found in the leases of public land for cultivation given to private persons by the state, the enjoyment of which Ulpian tells us (Dig. 43. 8) was protected by the praetor by means of an interdict de loco publico fruendo. As however Niebuhr (Röm. Geschichte, i. pp. 171 and 172) has shown, the amount of the public land was enormously reduced by the agrarian laws of the later Republic, the foundation of military colonies, and the grants made to his victorious soldiery by Vespasian: but the practice of letting their lands out for tillage at a rent (vectigal) was adopted by the collegia of priests and municipal corporations,

and the ordinary duration of the term seems to have been constantly growing until a lease in perpetuity became the most usual form of the tenure. The lessee in such cases enjoyed the protection of the interdict already referred to: and though it would seem that in Gaius' day (iii. 145) his interest was conceived as contractual only, it had by the time when Paulus wrote definitely acquired the character of a right in rem, which could be asserted even against the lessor himself when non-payment of rent was not alleged: 'agri civitatum vectigales vocantur, qui in perpetuum locantur, id est hac lege, ut quamdiu pro his vectigal pendatur, tamdiu neque ipsis, qui conduxerint, neque his, qui in locum eorum successerunt, auferri eos liceat. Qui in perpetuum fruendum conduxerunt a municipibus, quamvis non efficiantur domini, tamen placuit competere eis in rem actionem adversus ipsos municipes, ita tamen, si vectigal solvant,' Dig. 6. 3. 1 and 2: in Dig. 39. 2. 15. 26 this action is called actio vectigalis. The approximate date of this development suggests that it was due to juristic rather than to praetorian action. Similarly, though not owner (Dig. loc. cit.) the lessee of ager vectigalis might bring an actio confessoria utilis (Dig. 8. 1. 16) for the vindication of servitudes appurtenant to his land, and other actions which properly lie only at the suit of an owner (Dig. 47. 7. 5. 2).

In the Greek provinces of Rome perpetual leases of agricultural land seem to have been commonly granted by private individuals no less than by Corporations (φύτευσις, ἐπικαρπία); and in the Eastern portion of the Empire the practice was extensively adopted by large landowners of all kinds, including the Emperor and Fiscus, especially in respect of waste land, the letting being on the terms that the lessee should reclaim the soil and bring it under cultivation. The provincial usages, and the jurist law relating to ager vectigalis, were the basis of the legislation on the subject which commences with the Christian Emperors. In this the tenure is termed Emphyteusis, and lands so held praedia Emphyteutica or Emphyteuticaria: the annual rent is termed pensio or canon more often than vectigal. The precise nature of the lease and of the Emphyteuta's right, which in Gaius' day had been matters of dispute, was determined by Zeno (Cod. 4. 66. 1, Bk. iii. 24. 3 inf.), who enacted that the transaction should be neither sale nor ordinary hire, but be governed by special rules of its own: his settlement of the law passed with little or no alteration into the Corpus iuris of Justinian, for ager vectigalis no less than for Emphyteutic land.

Writing was necessary for the creation of an Emphyteusis if the

land belonged to the church or a charitable foundation (Nov. 120. 6. 2); in other cases only if it was desired to introduce some modification into the ordinary rules governing the tenure (Cod. 4. 66. 1). The Emphyteuta was entitled to the complete use of the land, without being subject to the limitations imposed on the usufructuary (p. 221 supr.). He became the owner of its fruits by separation (Dig. 22. 1. 25. 1: see note on Bk. ii. 1. 35), and might freely alter its character, though he could not claim any compensation for improvements, provided he did it no permanent injury (Nov. 7. 3; 120. 6): in that event he must indemnify the owner, and might even be evicted if that owner were a church or charitable foundation (Nov. 120. 8). His rights were heritable, and alienable both inter vivos (Cod. 4. 66. 3) and by will: he could mortgage them (Dig. 13. 7. 16. 2), and create servitudes over the land available so long as his interest endured (Dig. 7. 4. 1 pr.; 30. 71. 5–6). In the form of actiones utiles he enjoyed all the remedies of an owner, and like the superficiarius he had detention of the land and quasi-possession of his own interest, being thereby entitled to avail himself of the possessory interdicts.

His chief duties were to pay his rent and all taxes assessed upon the land (Nov. 7. 3. 2; 120. 8), and so long as his rent was unpaid the owner might prevent him and others claiming through him from exercising any rights over it (arg. Dig. 13. 7. 17). He was liable to eviction (1) if he was in arrear with taxes for three years (Cod. 4. 66. 2): (2) if his rent was unpaid for the same time, or two years if the owner was a church or charitable foundation: (3) if he neglected his duties on alienation (Cod. 4. 66. 3). Unlike the colonus or ordinary farming tenant, he was not entitled to any remission of rent on account of bad seasons or difficulty in getting in his crops (Cod. ib. 1: see iii. 24. 3 inf.). If he proposed to alienate his interest, he was bound to give his lord notice, and obtain his assent and approval of the person of the alienee: this could be refused only on reasonable grounds, and must otherwise be given within two months of the application. The alienee became liable for the alienor's arrears of rent (Dig. 30. 39. 5), and the lord was entitled to a commission or fine of two per cent. on the purchase money or value of the holding, besides having, if he chose to exercise it within two months, the right of pre-emption at the price agreed upon (Cod. 4. 66. 3). The modes in which Emphyteusis arose are substantially the same with those for the creation of superficies, and the doubt as to the admissibility of usucapion applies to both.

The mention of pignus, the last of the three iura in re aliena which are not servitudes, makes this the most convenient place for discussing the different forms which pledge or mortgage took in Roman law. The object of pledge is to give a creditor a real security in addition to the personal security of his debtor. If the creditor relies for satisfaction of his debt solely on a general belief in his debtor's ability and willingness to meet his liabilities, he contents himself with a personal security, and if the debtor's assets prove insufficient, he must *pro tanto* be a loser: but if by any means he obtains rights over some definite portion of the debtor's property, to which he can resort in the event of non-payment, his security is real, 'quia expedit ei pignori potius incumbere quam in personam agere' Bk. iv. 1. 14 inf. Real security, in short, is a means of protecting a creditor against the risk of the debtor's insolvency: for creditors who are only 'personally' secured have no rights against the specific property to which the 'really' secured creditor can resort until the latter has been paid in full. Bearing this in mind, it is clear that that form of real security is the most satisfactory which, while it absolutely secures the creditor, causes the least inconvenience in other ways to the parties concerned. It is important to observe how far these conditions respectively are satisfied by the different forms of real security known to the Roman lawyers, and also how far these themselves belong to the department of iura in re aliena.

The earliest form was that known as fiducia,[1] a term which here bears the same meaning as in connection with deposit, emancipation, and coemption, the general idea being that of a conveyance under an agreement of trust, whereby the transferee is laid under an obligation to deal with the person or property conveyed to him in a particular manner. The aim of real security was obtained by the debtor's conveying specific property by mancipation or by in iure cessio to the creditor, with an agreement that the latter shall reconvey upon payment of the debt and such interest as might be agreed upon within a specified time: 'fiducia est cum res aliqua sumendae mutuae pecuniae gratia vel mancipatur vel in iure ceditur' Isidor. Orig. 5. 25: Gaius ii. 59.[2] The effect of the transaction was thus to transfer the property in absolute ownership (subject to the trust agreement) to the creditor: hence a striking resemblance to the

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[1] See Muirhead, Roman Law, pp. 139–143.

[2] This pactum fiduciae was not an integral part of the mancipatio or in iure cessio, but 'adiectum' to it, as in the case of bonae fidei contracts: see the inscriptions cited in Girard, Textes, p. 737.

English mortgage of realty. Consequently, the creditor could, subject to the terms of his fiducia, deal with it as he pleased, though any gain he made by it until the debtor lost his right of redemption went to reduce the principal debt: 'quidquid creditor per fiduciarium servum quaesivit sortem debiti minuit' Paul. Sent. Rec. 2. 13. 2: he had the right of sale necessarily, as being dominus, though if he exercised this right before the day fixed for payment had passed he did so at his peril, and of it he could not deprive himself even by express agreement, Paulus l. c. 5. But the debtor, though no longer owner, could still sell it as well: for (Bk. ii. 1. 41 supr.) he could not be compelled to transfer to the vendee until the latter had paid the price, and with this he could redeem the property, and so make a good title: but he could not sell to the creditor, for 'suae rei emptio non valet'. In the event of sale by the creditor the debtor was entitled to any surplus after satisfaction of the debt, Paulus l. c. 1: and it seems probable that, in the absence of agreement to the contrary, he might redeem the property at any time so long as the creditor had not yet parted with it. Such contrary agreement usually took the form of a foreclosure clause (lex commissoria), providing that in default of punctual payment the fiducia should lapse, and the property vest absolutely in the creditor: this was prohibited for all forms of pledge by Constantine, but foreclosure was reintroduced in a modified form by Justinian. The remedy by which the debtor enforced his rights against the creditor was the actio fiduciae, condemnation in which entailed infamia, Gaius iv. 182.[1] The advantages of fiducia, as a species of real security, lie in the fact that no subsequent dealing with the property by the debtor can prejudice the creditor, so that collisions between different creditors become impossible: its faults are mainly that only such kinds of property can thus be used which admit of mancipatio or in iure cessio (by which provincial land was excluded), and that the debtor was deprived of the use and enjoyment of the object pledged. This last inconvenience, however, was frequently obviated by his being allowed to receive it back on hire or as precarium. If the debtor after paying his debt acquired possession of the property and retained it for a year, he became its owner again (usureceptio ex fiducia, Gaius ii. 59. 60): for this variety of usucapion neither bona fides nor iusta causa possessionis was required.

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[1] It is doubtful whether this action existed under the legis actio system: see Girard, p. 511, note 5, and Nouvelle Revue Historique, 1897, pp. 254-256.

When possession had been raised to a legal interest by the praetor's introduction of special remedies (possessory interdicts) for its protection, a new form of real security, called pignus, came into existence, the transaction consisting in mere delivery (traditio) of possession of the object (as distinct from its ownership) from debtor to creditor, with the understanding that the possession should be redelivered on payment of the debt: 'pignus est, quod propter rem creditam obligatur, cuiusque rei possessionem solum ad tempus consequitur creditor, dominium penes debitorem est' Isidor. Orig. 5. 25, 'proprie pignus dicimus, quod ad creditorem transit, hypothecam, cum non transit, nec possessio, ad creditorem' Dig. 13. 7. 9. 2; Bk. iv. 6. 7 inf. In origin perhaps pignus was regarded less as a form of security than as a device by which the debtor, being deprived of the possession and enjoyment of property, would be strongly induced to make every effort to discharge his liability as soon as possible. This conjecture is strengthened by the fact that a right of sale was not incidental to a pignus, as such; if the creditor had it at all, it was only by express agreement (Bk. ii. 8. 1 supr. from Gaius ii. 64), and to sell it without such right was theft in law: 'si is qui pignori rem accepit, cum de vendendo pignore nihil convenisset, vendidit . . . . furti se obligat' Dig. 47. 2. 74. As a matter of common right, the creditor was entitled only to retain possession of the object pledged; he might not use it: 'si pignore creditor utatur, furti tenetur' Dig. ib. 54 pr.; cf. Bk. iv. 1. 6 inf.: but where the object was a fruit-bearing thing, it was often agreed that the pledgee should be entitled to the fruits in lieu of interest: the pignus was then called specifically antichresis. If the pledgee had bargained for and exercised a power of sale, he was taken to sell as the pledgor's agent ('nihil enim interest utrum ipse dominus per se tradat alicui rem an voluntate eius aliquis' Dig. 41. 1. 9. 4: cf. 'voluntate debitoris intellegitur pignus alienari' Gaius ii. 64), and therefore would vest in the purchaser the ownership or whatever other right belonged to the latter. Of course the debtor was entitled to any surplus of the purchase money after satisfaction of the creditor's claims. Pignus then, in itself, is not a ius in re aliena. The sole right which the pledgee could assert against the world was the right of possession, and this is never treated as a ius in re aliena by the Roman lawyers. Though it marks a considerable advance upon fiducia, it laboured under four defects. It deprived the debtor of the possession of his property, though in respect of land this might be safely obviated by allowing him to hold it as precarium or on hire. The same

object could not be pledged to two different people, though possibly ample security for both debts, for ‘ plures eandem rem in solidum possidere non possunt ’. Again, although no doubt things could be pledged in this way which could not be the subject of a fiducia, such as provincial land, no security could be thus created except over corporeal things which admitted of physical possession. And, finally, in respect of some species of property pignus was no real security at all : even if the pledgee were in possession of a praedium Italicum, the pledgor could mancipate it to a third person (the transaction not being required to take place on the land, Gaius i. 121), who could recover it by real action.

The latest and most refined form of pledge is hypotheca,[1] in which there was no conveyance of either ownership or possession ; it was effected by a bare formless agreement between the debtor and creditor, that certain property, general or specific, of the former should be liable in full for his debt to the latter, who should be entitled to sell in default of payment within a prescribed time : ‘ contrahitur hypotheca per pactum conventum, cum quis paciscatur, ut res eius propter aliquam obligationem sint hypothecae nomine obligatae : nec ad rem pertinet, quibus fit verbis ’ Dig. 20. 1. 4. Such an agreement, in itself, was inoperative to create rights either real or personal : it was, however, enforced by the praetor, who enabled the creditor, by interdict, to take possession of the hypothecated property as soon as the debt became due, and to recover it by real action from any person whatsoever who disputed his rights over it, whether the creditor, his successor, alienee, or trustee in bankruptcy. The steps by which this praetorian innovation reached its full development are these. It was first introduced in the joint interest of landlord and tenant farmer, in order to enable the latter to pledge his farming stock and crops as security for his rent, a purpose for which pignus was not conveniently applicable : subsequently it came to be recognised as a universal mode of pledge, of use between debtors and creditors of every kind, though the rights of the latter, in cases other than that of landlord and tenant, were protected by remedies differing slightly in form and name from those then employed : for these, and the relation between them, reference should be made to Bk. iv. 6. 7, ib. 15. 3 inf., and the notes on both passages.

Hypotheca possessed great advantages over the earlier forms of

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[1] Probably not known under the Republic : Girard, 4th ed. p. 766, note 1.

pledge, of which fiducia was quite obsolete in the time of Justinian. The pledgor was never deprived of the use and possession of his property, and yet the creditor was absolutely secured. The class of pledgeable objects was largely augmented: money could now be lent on the security of things not yet in existence, e.g. future crops and expectations ('et quae nondum sunt, futura tamen sunt, hypothecae dari possunt, ut fructus pendentes, partus ancillae, fetus pecorum' Dig. 20. 1. 15 pr.), or of mere incorporeal rights, real and personal (Dig. ib. 9. 1; ib. 11. 2; Dig. 13. 7. 18 pr.). Moreover it became possible to create a general mortgage, which was done by statute in favour of many classes of persons: e.g. of a wife, or other person who gave a dos, over the property of her husband, to secure its return, and of pupils over that of their guardians. So too the landlord of a house had a tacit hypothec over things 'invecta and illata', as security for his rent: 'eo iure utimur, ut quae in praedia urbana inducta illata sunt, pignori esse credantur, quasi id tacite convenerit: in rusticis praediis contra observatur' Dig. 20. 2. 4 pr.: and the lessor of agricultural land had the same implied right over the crops: 'in praediis rusticis fructus, qui ibi nascuntur, tacite intelleguntur pignori esse domino fundi locati, etsi nominatim id non convenerit' Dig. ib. 7 pr. Lastly should be noticed the new power of pledging the same property to several persons in succession, though to do this without notice to prior pledgees rendered the debtor liable to a charge of stellionatus, Dig. 13. 7. 36. 1. Hence, too, questions of collision and priority among competing pledgees, which occupy so large a space in modern Roman law: a subject, however, too wide to be touched upon here.

One result of the general use of hypotheca was the extension of its rules and remedies to pignus. In the time of Ulpian the right of sale, which hitherto, as in the case of pignus, had rested only on express agreement,[1] had become an essential and inherent part of every pignus: 'etsi non convenerit de distrahendo pignore, hoc tamen iure utimur, ut liceat distrahere, si modo non convenit ne liceat. Ubi vero convenit ne distraheretur, creditor, si distraxerit, furti obligatur, nisi ei ter fuerit denuntiatum ut solvat, et cessaverit' Dig. 13. 7. 4. The remedies again were the same, whether the pledge was effected by pignus or hypotheca: so that in Justinian's time (as he remarks, Bk. iv. 6. 7 inf.), there was but one surviving point of difference between them: if possession of the object pledged passed

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[1] See Girard, 4th. ed. pp. 777–778.

to the creditor, it was called pignus, if not, hypotheca ; cf. Dig. 20. 1. 5. 1 (Marcianus) : 'inter pignus et hypothecam tantum nominis sonus differt.' The enumeration of pignus among the iura in re aliena is thus accounted for : it is a right in the property of another, sensu Romano, only *qua* hypotheca.

The modes in which the right was extinguished require a brief notice. It ceased to exist with the destruction of the object pledged, Dig. 20. 6. 8 pr. : it might be released, without affecting the debt which it secured, and that either by legacy or agreement inter vivos, Dig. ib. 4. 1 : and under certain circumstances it could be destroyed or affected by usucapio or limitation of actions : see Dig. 41. 3. 44. 5 ; Cod. 7. 36. 1 ; 8. 30. 2. But as a general rule the right of pledge ceases to exist only along with the principal debt : for the ways in which this might occur see Bk. iii. 29 inf. and notes. As to the exercise of the right of sale in particular it should be observed, (1) that the creditor cannot sell until the day fixed for payment has passed ; (2) he must give notice to the debtor of his intention to sell, and Justinian even enacted (Cod. 8. 34. 3. 1) that he should be unable to sell until two years had elapsed from notice so given ; (3) neither pledgor nor pledgee can become the purchaser ; (4) the debtor is entitled to any surplus from the proceeds of the sale after satisfaction of the debt. If no one could be found to purchase at a reasonable price, the pledgee could in Justinian's time (by a kind of reintroduction of foreclosure, Cod. 8. 35) petition the Emperor to adjudge him the property in full ownership : but even such adjudication was not final, the debtor being still entitled to redeem within two years from its date.

EXCURSUS III

POSSESSION

Possession must be conceived as distinct from ownership or dominium. In most cases, of course, the two are conjoined: the owner has possession of his property. Often, however, they are separated: the landlord owns the soil which his tenant possesses: his solicitor has possession of the title-deeds to his estates: the finder of property possesses it, though another is its owner: and numberless other cases will at once occur in which the owner and the possessor of a thing are different persons: 'separata esse debet possessio a proprietate; fieri enim potest, ut alter possessor sit, dominus non sit, alter dominus quidem sit, possessor vero non sit; fieri potest, ut et possessor idem et dominus sit,' Dig. 43. 7. 1. 2. But (it may be argued) though this is so, yet the relation of a person to a thing which he possesses is immaterial for purposes of law: the law recognises no rights less than that of ownership or its fragments. Because I happen to have found a bank note, and then lose it again, I cannot recover it from the second finder: possession in itself is not a legal right at all. If this were the case, law-books would be spared one of their most difficult chapters; but, as a matter of fact, all legal systems treat possession, under certain circumstances, as a right, distinct from and independent of ownership, and guarantee it protection. It remains to see what, under Roman law, those circumstances are.

Mere possession, in itself, is no right at all. A person 'merely' possesses who has the physical power of dealing with a tangible object to the exclusion of every one else, and is aware of such power: 'possessio appellata est . . . a sedibus quasi positio, quia naturaliter tenetur ab eo qui ei insistit,' Dig. 41. 2. 1 pr. Of such a relation between person and thing, by itself, the law takes no notice; but being the foundation of all legally recognised possession it requires to be carefully noted. Very frequently it is called naturalis possessio (e. g. Dig. 41. 2. 1. 1), but it is also denoted by the expressions custodia (Dig. 36. 4. 5 pr.), in possessione esse (Bk. iv. 15. 5 inf.), tenere (Dig. 41. 2. 24), naturaliter possidere (Dig. ib. 12 pr.). We shall call it uniformly Detention. For examples of

persons who had only Detention, as distinct from possession proper (e. g. the slave, filiusfamilias, agent, borrower, lessee, and depositary) reference may be made to Mr. Poste's Gaius, pp. 616 sq. The idea of Detention is limited to certain classes of objects. Nothing can be 'detained' (and therefore, as we shall see, possessed) which is not corporeal; hence no one can stand in this relation to a mere right (p. 219 (5) supr.). The right to interdicts, however, was grounded upon a disturbance in some unlawful manner of the *exercise* of ownership, and the exercise of other rights, as well as that of ownership, can be unlawfully disturbed; so that it seemed only logical that here too unwarranted interference should be guarded against by the same remedies. Accordingly, the enjoyment of iura in re aliena was protected by possessory interdicts; they were deemed to be quasi-possessed ('iuris quasi possessio' Dig. 8. 5. 10, 'possessionem vel corporis vel iuris' Dig. 43. 26. 2. 3). The expression, as Savigny remarks, is an improper extension of analogical language; quasi possessio indicates the exercise of a ius in re aliena, being related to the latter in the same way as possession *stricto sensu* is to dominium. Nor is it possible to 'detain' an object which, though corporeal, is indeterminate, such as an uncertain portion of a thing. Finally, the idea of detention being that of exclusive physical control, we have the rule 'plures eandem rem in solidum possidere non possunt' Dig. 41. 2. 3. 5; i. e. if we read that a previously existing possession (and *a fortiori* detention) still continues, no new possession (and *a fortiori* detention) can possibly have commenced; and conversely, if the law recognises a new possession, the previous possession must have ceased to exist.

When to this Detention is superadded a further (mental) element, it becomes Possession, an interest protected by special legal remedies, viz. interdicts. That mental element is the intention, on the part of the detainer, of dealing with the thing detained as owner;[1] of exercising over it, on his own behalf, the rights which an owner exercises on his: 'furiosus et pupillus sine tutoris auctoritate non potest incipere possidere, quia affectionem tenendi non habent, licet maxime corpore suo rem contingant, sicuti is qui dormienti aliquid in manu ponat' Dig. 41. 2. 1. 3. This intention is usually called the animus domini or sibi habendi; the phrase does not occur in the

[1] So according to the doctrine of Savigny, which has become classical. According to another view, of which Ihering is the chief exponent, the intention is merely to keep the thing; the physical control of it, and the intention to exercise that control; see Girard, 4th ed. p. 264, note 3; p. 267, note 1.

authorities, the nearest approach to it being Theophilus' νέμεσθαί ἐστι τὸ ψυχῇ δεσπόζοντος κατέχειν. It should carefully be marked, that it is an intention; it has nothing to do with a belief that one *is* owner (opinio or cogitatio domini), for the possessing thief or robber is as capable of the animus domini as the most innocent possessor, and is as fully entitled to the protection of interdicts as the latter; 'adversus extraneos vitiosa possessio prodesse solet' Dig. 41. 2. 53; ib. 3. 5. In other words, possession is independent of bona fides: 'it is possession, whether iusta or iniusta;' the ius possessionis, the right involved in possession, the right protected by interdicts, is quite distinct from and independent of the ius possidendi, or right *to* possess, which belongs to the law not of possession, but of ownership.

There has been much learned discussion of the question whether Possession is a fact or a right. No doubt it differs from ownership in requiring a de facto relation between a person and an object, and to that extent it is a fact. But there is no doubt also that it has legal consequences,[1] and if that is so it seems to be little less than quibbling to say it is not a right as well. Among those consequences are its protection by legal remedies, already referred to, and the facts that in some cases acquisition of possession is acquisition of ownership either at once (occupatio, p. 198 supr.) or, under special circumstances, in conjunction with lapse of time (Bk. ii. 6 supr.).

Possession then, as a legal right, consists of two elements, detention and the animus domini. No one possesses who has not the exclusive physical power of dealing with an object, coupled with the intention of dealing with it as his own against all the world; the presence of these two marks entitles the person in whom they are united to the protection of interdicts. This possession, as distinct from detention, is called in the authorities most frequently possessio simply, but sometimes also possessio civilis (e.g. Dig. 41. 2. 24; 10. 4. 7. 1; 45. 1. 38. 7); Savigny terms it 'possessio ad interdicta'; we shall call it uniformly Possession.

In respect of three cases the preceding statement requires a slight

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[1] 'Possession, though no right, has legal consequences.' Windschied, Lehrbuch, § 148. 'Possession is no right, and as such gives no right to the thing which one possesses. It is merely a state of things (Zustand), a fact, a mere de facto relation to a thing into which a man has brought himself; which, however, inasmuch as it may under certain circumstances bring about a right to the thing, enjoys in itself the protection of the law against arbitrary disturbance. This claim to be protected in possession is certainly a right—a ius possessionis—that is, a right of the possessor implicated with the fact of possession.' Wächter, Pandekten, § 122.

modification. Possession is ascribed in the Digest to the pledgee in a pignus (41. 3. 16), the sequester or stakeholder (16. 3. 17; see on Bk. iii. 14. 3 inf.), and ordinarily to the precario rogans (43. 26. 4. 1), yet in no case can they be said to have the animus domini, for they all recognise and respect the dominium of another person. In these cases, then, for the animus domini the law allows the substitution of an animus alienam possessionem exercendi; they are termed by Savigny cases of derivative or representative possession, and are clearly distinguishable from those of the agent, borrower, ordinary bailee, hirer, usufructuary, and the missus in possessionem (Dig. 41. 2. 3. 23; ib. 10. 1), none of whom have more than Detention. Ihering and his school feel no difficulty in recognising these persons as possessors on their own account: other persons, such as depositaries and borrowers, they say, possess only alieno nomine, and as such are not entitled to legal protection: see Gaius iv. 153.

Possession is acquired by the production of its two elements, viz. corpus or factum (when this alone is present there is detention) and animus; 'adipiscimur possessionem corpore et animo, neque per se animo aut per se corpore' Dig. 41. 2. 3. 1. The act by which corpus, the physical control, is produced, is called usually apprehensio, or, where effected with the consent or co-operation of the prior holder, traditio. Apprehensio of immoveables most commonly takes the form of actual presence upon the land (Dig. 41. 2. 3. 1), but actual entry is not necessary if one stand near enough to overlook it all, for here one's control over it is as great as if one had actually entered (Dig. 41. 2. 18. 2). Nor, to 'apprehend' moveables, is it strictly necessary to grasp them with the hand; it is sufficient if the thing could at any moment be so actually grasped as to give the exclusive control (Dig. loc. cit. 1. 21); in both cases it is not the nearness, or even the presence, of the object which constitutes corpus, but the capacity of physical control to the exclusion of all others; thus, a man has not detention of objects placed in his house, if it is in the occupation of another, e.g. a lessee.

The animus domini will of course usually precede, as well as accompany, apprehension. But sometimes it arises later: e.g. a person has merely Detention, without the animus; he then determines to hold for himself exclusively; the Detention is converted into Possession (for the analogous case of detention passing into dominium see Bk. ii. 1. 44 supr.). Where A has detention of an object which B possesses (e.g. if he is B's lessee), and it is then agreed that A shall possess instead of detain, A becomes possessor

ipso facto. This is called traditio brevi manu; but the sole will of a person who detains by permission or on behalf of another cannot, by itself, give him Possession: see (3) p. 338 inf.

The animus domini implies volition; hence from lack of this power the following classes cannot acquire Possession: (1) Juristic persons, Dig. 41. 2. 1. 22; (2) persons of unsound or weak intellect, ib. 1. 3; (3) pupilli of tender age, unless they have their guardian's auctoritas; but possession can be acquired for these three classes by agents, and the law regards the possession somewhat anomalously as theirs; Dig. 41. 2. 1. 22; ib. 1. 3; ib. 1. 20: (4) persons in potestas, or manus, cannot acquire more than Detention; for, being incapable of holding property, they are incapable of animus domini, except in relation to peculium castrense or quasi castrense; 'qui in aliena potestate sunt, rem peculiarem tenere possunt, habere et possidere non possunt, quia possessio non tantum corporis sed et iuris est' Dig. 41. 2. 49. 1. Again, certain things are excluded from possession on this ground, viz. res extra commercium, Dig. 41. 2. 30. 1, though it is admitted in respect of ager publicus and provincial soil; and the animus domini is inconceivable in relation to an object which cannot itself be conceived as a single individual thing. Hence the question arises, how far is it possible to acquire Possession of a single part of a whole? Where the single part is to be possessed alone, this is possible (1) where the part is in point of fact a whole itself: e.g. a plot of land of definite extent, which the previous possessor happens to have treated as part of a larger whole: and (2) where the division of the whole into parts is merely intellectual, provided the ideal part to be possessed is precisely conceived as a definite fraction of that whole. But where the part is to be possessed in and through the whole, the rule is, that though the whole is possessed, the parts individually are not. For applications of this principle, which is of great importance in the usucapio of buildings, see Poste, Gaius, pp. 621 sq.

We can also acquire Possession through other persons as well as through ourselves. For this the following conditions must be satisfied:

(1) The other person (whom for convenience sake we will call the agent) must have Detention, and also intend to acquire Possession for the principal.

(2) The principal, or would-be possessor, must intend to acquire Possession through the other, though this intention will be implied where that other is his own slave acquiring ex peculiari causa, a guardian, curator, or the agent of a juristic person.

(3) There must be a certain legal relation between principal and agent. Possession can be acquired through slaves by the dominus (provided he possesses the slave), the bona fide possessor, and the usufructuary; through filiifamilias by the pater (for persons in manu or mancipio see Gaius ii. 90); through guardians or curators by the ward, and through free agents by any principal who has previously given them a commission, or who has subsequently ratified their acts (Dig. 41. 2. 1. 20; ib. 9. 34. 2). Where the agent already has possession of the object prior to his commission, the mere subsequent exercise of will turns his possession into detention; the possession vests immediately in the principal. This, which is the converse of traditio brevi manu, is called constitutum possessorium; Dig. 41. 2. 18; 6. 1. 77.

Possession already acquired is retained by the continuing presence of its two elements; but the law does not require for its retention so much 'energy' (so to speak) on either side as for its original acquisition: see Poste, Gaius, pp. 620, 621. The question how possession is retained is practically equivalent to that how it is lost; and it is lost by the cessation of either corpus or animus domini: 'quemadmodum nulla possessio adquiri nisi animo et corpore potest, ita nulla amittitur nisi in qua utrumque (i.e. aut utrumque aut alterutrum, Sav. Possession, § 30) in contrarium actum est' Dig. 41. 2. 8; 50. 17. 153. Corpus ceases so soon as the possessor loses his ability of dealing with the thing himself, and of preventing others from dealing with it; this may occur by its destruction, by his altogether forgetting where it is, or losing it from beyond his reach (except in the case of a runaway slave, who is possessed till some one else possesses him, or unless he bona fide believes himself free, Dig. 41. 2. 13 pr.); by its being stolen, or being taken in possession under a magisterial decree; by the possessor's being taken captive, or by the thing itself ceasing to be in commercio. In order to lose Possession animo solely, more is required than a mere cessation of the previous mental attitude; there must be a new determination of the will, an animus in contrarium actus, a deliberate desire to transfer or abandon possession. Consequently, persons of weak or unsound mind and pupils cannot lose Possession animo solo. In many cases of course Possession is lost animo et corpore simul; viz. in abandonment, conveyance, manumission of slaves, and violent ejectment from land on which the ejected person fears to re-enter.

As to loss of Possession through agents, it should be observed, (1) That mere intention of the principal no longer to possess is

sufficient; Detention may remain, but one of the elements of Possession, animus, has ceased to exist. (2) On the other hand, if, though the principal no longer has detention, his representative has, the Possession is not terminated: 'si quis me vi deiecerit, meos non deiecerit . . . . per eos retineo possessionem', Dig. 43. 16. 1. 45: nor is it lost even by cessation of the representative's Detention, unless Detention becomes physically impossible, or Possession is assumed by some one else. (3) For the representative to convert his own Detention into Possession, there must be either traditio brevi manu (contrarius animus on the part of the principal), or (Dig. 41. 2. 3. 18) some contrectatio on the other's part amounting to furtum. (4) Misdealing by the agent (i.e. conveyance or abandonment) does not terminate the Possession unless another party directly assumes it. (5) Mere termination of the relation of principal and agent does not, in itself, extinguish the Possession, Dig. 41. 2. 38; ib. 25. 1; ib. 40. 1.

A question which has been much discussed is why Possession, apart from bona fides and title, came to be treated as a right, and protected by legal remedies. To this Savigny answers, that the violation of Possession, being in itself no wrong, can originally have been redressed only because it went hand in hand with some violation of an actual right, and that full justice could not have been done in the matter of this latter violation, unless at the same time the Possession were protected. All the possessory interdicts, he says, presuppose some wrongful act. In cases of violent dispossession this is obvious; but even where there is no violence the idea is the same; e. g. in the application of the interdict de precario there is the wrongful act of abusing another person's good nature: cf. Holland's Jurisprudence, p. 130. Ihering (Über den Grund des Besitzesschutzes) thinks that Possession was protected originally in the interest of the owner, in order to relieve him of the onus of proving his proprietary title, and that the protection came necessarily to be extended to possessors who were not owners; but if this were true, a possessor would never be protected against an owner, and the relief imagined would be afforded not to the possessor as such, but only to him whose possession was wrongfully infringed.[1] On the historical question, in what connection the necessity of legal protection was first felt, Savigny adopts the theory of Niebuhr, that possessory interdicts were

[1] Ihering's theory seems now to be very generally supported: see Girard, 4th ed. p. 268.

originally devised in order to guard the interest of the individual citizen in the ager publicus, which the State permitted him to occupy and enjoy, and were subsequently extended to the Possession of private property, moveable and immoveable. In support of this it is pointed out that possessio and possidere are very uniformly used to technically denote this kind of occupation, and that the interdicts recuperandae possessionis relate only to immoveables; other arguments are derived from the known facts of precarium and emphyteusis (Savigny, Possession, § 12[a]). A different view is taken by Puchta, who connects the earliest protection of Possession with the primitive form of Real Action. In this, both plaintiff and defendant were, until decision of the suit, regarded by the law as equally entitled to the dominium. It was necessary, however, that one of them should be magisterially instated in the possession of the disputed property pending litigation, and we learn from Gaius (iv. 16) how such interim possession was awarded. Having been magisterially awarded, it must also be magisterially protected, and this was done by an interdict; a remedy which came subsequently to be used for the protection of all Possession, independently of a pending suit.

Dr. Hunter (Roman Law, 1st ed. pp. 195–222) believes that Possessio entirely changed its meaning in the course of Roman legal history. In origin he connects it with the technical incapacity of aliens to own property iure civili rather than with the occupation of ager publicus, and maintains that it properly means Equitable or Gentile ownership. When, after the edict of Caracalla, all subjects of the Empire practically became cives, its functions, in this connection, were exhausted, and it 'came to have precisely the same meaning that it has in every system of law; it is a temporary separation between the person exercising rights and the person invested by law with rights'.

There is no evidence of this change of meaning, and nothing to show that the Roman lawyer's idea of Possessio differed in the time of Justinian from what it had been in that of Cicero, or that he conceived Possession as otherwise than the very antipodes of dominium ('nihil commune habet possessio cum proprietate' Dig. 41. 2. 12. 1: ib. 52 pr.: cf. Dig. 43. 17. 1. 2, cited on p. 332 supr.); or, finally, that the 'gentile' ownership of the alien (p. 197 supr.) was specially protected by interdicts; he recovered his property, not by an interdict, but by a real action, fictitia or utilis perhaps, but still a remedy which recognised his proprietorship. On the other hand, as all

Possession, whether iusta or iniusta, whether bona fide or mala fide, was protected by interdicts, to dwell upon the close resemblance, the almost complete material identity, between many cases of bona fide Possession, and Equitable ownership, as Dr. Hunter does, is not to the point. The actio Publiciana was open to any possessor whose Possession could ripen by usucapio into ownership ; and if he could bring it with effect against not only third persons but the technically Quiritarian owner as well (as where the owner of a res mancipi delivers it to some one else with the intention of passing the property, Dig. 44. 4. 4. 32) his interest was more than Possession ; it was inchoate or Bonitarian ownership, or, adopting an expression of Mr. Poste's, we may say that the ius in rem, and the interdict-possession are distinct though concurrent. The fallacy of arguing that, because many cases of (bona fide) Possession are equivalent to Bonitarian ownership, therefore (all) Possession is equivalent to Equitable ownership, is obvious. In the law of Justinian the case in which the plaintiff in an actio Publiciana could prevail against any and every defendant has disappeared with the abolition of the distinction between res mancipi and nec mancipi. It can now be brought by one who has acquired possession in good faith (Dig. 6. 2. 7. 11–17 : 9. 4. 28) and with iusta causa (Dig. 6. 2. 13 pr.) of an object acquirable by ordinary usucapion (Dig. 6. 2. 9. 5) against anyone who withheld possession from him except the owner, who could repel him by the exceptio iusti dominii (si ea res possessoris non sit), Dig. 6. 2. 16 and 17.

Dr. Hunter seems to have been led into what we cannot but regard as other than a completely wrong theory by not rigidly confining his attention to Possession—not this possession or that possession, but all Possession—whether bona fide or mala fide. His insurmountable difficulty lies in the impossibility of identifying Possession, when accompanied by mala fides, with Equitable ownership. Upon mala fide Possession he is inconsistent. In one passage (p. 205) he says, 'the interdicts were open equally to mala fide possessors ;' in another (p. 200), 'the mala fide possessor of moveables had no right against third persons.' The latter statement, which is based solely on the inability of a mala fide possessor to bring an actio furti or bonorum vi raptorum, is shown to be untrue, so far as interdicts are concerned, by Savigny and Dr. Walker (Selected Titles from the Digest, Introduction to Digest 41. 2) : and interdicts are all that here we need concern ourselves with ; other remedies are not for the protection of Possession, as such, at all. In

fact, Dr. Hunter's general position seems defensible only to this extent, viz. that where a man has usucapion Possession, he also has Equitable ownership.

For a discussion of the question, to what part of the Roman system the doctrine of Possession logically belongs, see Poste, Gaius, pp. 622 sqq.; and for the possessory interdicts, and the cases to which they were individually applicable, Bk. iv. Title 15, and notes inf.

INTRODUCTION TO BOOK III

In this book the treatment of universal succession is continued, the first subject considered being the mode in which a person's universitas iuris devolves on his dying intestate. This falls naturally into two divisions, according as the deceased was free-born or libertus. Of the devolution of a free-born man's universitas we have a full historical account. The first two Titles in the main describe the classes of persons who succeeded an intestate under the law of the Twelve Tables: in the first rank being the sui heredes to the exclusion of all other descendants; in the second the nearest agnate or agnates, in preference to ascendants and all other collateral relatives whatsoever. No portion of the Institutes presents so clearly the contrast between modern and ancient law, or brings out more vividly the exclusive regard paid to agnatic relationship in primitive society. While pointing out the injustice which this system of succession entailed upon many classes, especially emancipated children and descendants or collaterals who traced their kinship with the deceased through a female, Justinian takes occasion to describe briefly the extent to which a remedy had been supplied by the bonorum possessio intestati of the Praetor, a subject more explicitly treated in Title 9, and also various disconnected changes made in the law by earlier Emperors as well as by himself. To the most sweeping of the Praetor's innovations, namely that by which he granted rights of succession upon intestacy to persons related to the deceased by cognation alone, though only in subordination to the classes recognised by the Twelve Tables, the fifth Title is exclusively devoted; that which follows details the mode in which the degrees of this natural relationship are calculated. The third and fourth Titles deal with two enactments of the civil law passed in the course of the second century, the SC^{a} Tertullianum and Orfitianum, which redressed a wrong arising from the Twelve Tables for which no adequate remedy had been provided by the praetorian bonorum possessio. The first of these preferred the mother to many of the agnates of her deceased children: the second raised a woman's children from the rank of mere cognates, in relation to her, to that of sui heredes, thus giving them a statutory right of succeeding her to the exclusion of her agnates.

The intestate succession to freedmen is dealt with in Title 7, the earlier paragraphs of which give a historical summary of the old rules in cases of both testacy and intestacy, and of the changes introduced in the interest of the patron by the Praetor and the lex Papia Poppaea. Between this, and a brief account of the curiously contrasted mode of succession to Latini Iuniani, a class of freedmen which as we know was abolished by Justinian, is a statement of his own settlement of the classes entitled to succeed upon the intestacy of a civis libertus, and of the latter's testamentary rights against the patron. The modification which might conceivably be effected in these rules by the exercise of a power, conferred by a senatusconsult, of assigning any particular freedman to any particular child in one's power is considered in Title 8.

The Roman law of intestate succession, especially to ingenui, is an admirable illustration of the heterogeneous mass of rules which may grow round any subject usually regulated by law where there is a variety of legislative organs, often actuated by diverse motives, and little anxiety in the supreme legislature or in the lawyer class to reduce them to formal order and unity by some process of codification. Technically, of course, the rules which, at the date of the publication of the Institutes, decided on whom an intestate person's universitas iuris should devolve, were enacted by Justinian himself; historically, they originated either in the Twelve Tables, or in the Edict relating to bonorum possessio, or in the later civil law, which either through senatusconsulta or imperial constitutions, conferred at long intervals of legislation, and in an entirely disconnected manner, rights of succession upon relatives of the deceased whom the earlier law had altogether passed over. The main drift of this series of changes was the same throughout; to fill up the voids and correct the anomalies of the Twelve Tables; to substitute cognation for agnation as the sole title a person could have to succeed. No department of law called more imperatively for a comprehensive simplification, such, for instance, as that which we have seen Justinian effected in the law of Usucapion and Prescription; but the changes made in the Code are hesitating and tentative, the most considerable perhaps being that in the classes of bonorum possessores, necessitated by Justinian's reform in the succession to liberti, of which a full account is given in Title 9. When the Institutes were published, the three distinct bodies of rules relating to one subject still coexisted side by side: the successor of an intestate might base his claim on the Twelve Tables, on the Edict

or on some enactment of the later civil law ; in the second case, it is true, he was not technically heres, but, as we have already seen, his rights were substantially identical with those of a civil law successor. Cases were even still to be found, in which agnatic relationship entitled a claimant to priority over others who, if cognation alone were considered, would at least take with him pari passu. It was not unnatural that Justinian should be dissatisfied with his work, and by a Novel issued in the year A.D. 543 he substituted for the system of succession which has here been sketched a new scheme based entirely upon blood relationship, of which an account is given in the notes to Title 9. 9.

Two other modes 'quibus res per universitatem adquiruntur', though of far less interest and importance than inheritance, are described in Titles 10 and 11. The first of these is the type of adoption known as adrogation. When a person sui iuris gave himself in adoption to another, his universitas iuris passed, under the law as previously settled, to the latter ; but the development of the filiusfamilias' proprietary capacity had infringed upon the necessity of this rule, and Justinian, as he himself remarks, limited the adrogator's right in accordance with the principle which he had already established in the second book. The liability of the adrogator for debts contracted by the adopted son while sui iuris is treated in the last paragraph of the Title. The last remaining form of universal succession, which was introduced by a constitution of Marcus Aurelius, was a provision 'favore libertatis', to secure the freedom of slaves who had been manumitted in a will under which no heres accepted, and enabled any one who would give the creditors full security for the satisfaction of their claims to have the estate adjudged to him, thus putting it in his power, as quasi heir, to fulfil the intentions of the deceased.

Title 12 briefly touches on two universal successions obsolete under Justinian's legislation ; the one the peculiar form of bankruptcy execution known as bonorum emptio—a subject which is more fully discussed in a note on the text ; the other introduced by the SC. Claudianum, of which we have already read, and which, with its consequences, was repealed by Justinian in person.

From this subject we pass at Title 13 to the consideration of the important class of res incorporales called obligations. An obligation is a legal relation between two ascertained persons, in virtue of which the one is entitled to claim an act or forbearance from the other. The one, or creditor, has a right in personam, the other, or debtor,

owes to him a relative duty; both right and duty are conceived as obligationes, or as correlative parts of a single obligatio; but it is the right, or creditor side, alone which is a res incorporalis, and owing to which this department of law falls under the head of 'res' at all.

This is not so clear and above doubt as never to have been questioned. The position of obligations between the law of Inheritance and the law of Actions has led Hugo and others to regard them as a portion of the latter rather than of the ius quod ad res pertinet; a theory to some extent countenanced by the fact that in the Digest (de obligationibus et actionibus, 44. 7) and Code (4. 10) actions and obligations are treated together, and by the technical meaning of 'actio' as action in personam, in contrast with 'petitio' or action in rem, Dig. 44. 7. 28; 50. 16. 178. 2. It has even been attempted to support this view by a statement of Theophilus in his commentary on Tit. 13 pr. of this book, where he says, 'Now that we have spoken of persons and of things, we ought logically to treat of actions; but this arrangement, i.e. the treating of obligations first, is not inexcusable, for in discussing obligations one is implicitly discussing actions also, of which they are the mothers.' But it is clear from his remarks on Bk. iv. 6 pr., that Theophilus is preferring a fourfold division of the law, making obligationes a fourth and independent department intermediate between res and actiones; and this cannot convince us that Justinian in his Institutes intended to depart from the arrangement of Gaius: for although, had we the Institutes alone, a reasonable suspicion might be justified by the fact that obligations are partly treated in the third book, which one doubts begins with res, and partly in the fourth, which no one doubts ends with actiones, yet this is removed by our knowledge that Gaius concludes the subject of obligations in his third book, and devotes the whole of the fourth to actions. Indeed, the enumeration of obligations among res incorporales in Bk. ii. 2. 2, is sufficient proof in itself of the wrongness of Hugo's theory.

The acts or events which give rise to this kind of legal relation called obligatio are of course different from one another in character, but they may be grouped with tolerable correctness in two principal and two subordinate classes. One of the former, which is prominent in all developed systems of law, is agreement; the other is delict, which may here be defined with sufficient accuracy as civil wrong other than breach of contract. But there are obligations which take their rise in circumstances in which the person held liable has neither entered into an agreement with the other party to the relation,

nor committed a delict against him, in the technical Roman sense of the word. In these circumstances, however, it is always possible to find more or less of analogy with one or other of the main sources of obligations: so that obligations are said in Tit. 13. 2 always to arise from contract or quasi ex contractu, or from delict or quasi ex delicto.

Not all agreements are contracts; in other words, it does not follow that because a person has given a promise he can be compelled to keep it by action at law. Primitive law, it would seem, at first enforces promises only when they are accompanied by some striking and solemn formality: formal contracts are actionable before those which are formless. There were three kinds of form known to the Roman system in which a promise might be clothed so as to be enforceable at law, two of which, nexum and expensilatio or litterae, were obsolete long before Justinian, though there is some notice of the second, and a lame attempt to represent it as still existing, in Title 21. The third was stipulatio, the expression of the agreement in a solemn question and answer, which, however, by a gradual process of change had in Justinian's own age been so stripped of its original characteristics, that it is only by an abuse of language that it can be described as a formal contract at all. But quite early in the history of the Roman Law this requirement of form, coupled with the inability of aliens to employ it, was found so to hamper the freedom of commercial intercourse, and to interfere so largely with the transactions of everyday life, that certain contracts of the ius gentium were added to the small circle already recognised: two kinds of loan, deposit, and pledge were held to be actionable merely in virtue of delivery by one party to the other, whence the obligation was said to be imposed 're', while sale, hire, partnership, and agency could now be contracted by the mere consent of the parties without the necessity of any formality, and consequently were called 'consensual' contracts. All of these subjects are treated at considerable length in this part of the Institutes. The contracts which are called Real—mutuum, or loan for consumption, commodatum, or loan for use, deposit, and pledge—because the 'causa' through which they become actionable is 'res' or delivery, are discussed in Title 14. Stipulation receives a consideration commensurate with the importance of the part it played in so large a proportion of the daily dealings between man and man. In Title 15 a historical account is given of the changes which took place in the form of the contract between the earliest and the latest phases of the Roman Law; alternatives are soon

tolerated for the old sacramental terms, which none could use but Roman citizens, and thus peregrini are enabled to avail themselves of this universally applicable contract form ; the question and answer are allowed to be expressed in other languages than Latin, and the strict and literal correspondence between them is no longer regarded as indispensable ; finally, that they should be not only oral, but interrogative in form, is found to be an inconvenient and unnecessary condition, and the original solemnities of stipulation have dwindled into a written memorandum of a promise fictitiously represented as having been made in answer to a preceding question. Some minor matters, such as the qualification of such promises by time and conditions, and the use of penalties under many circumstances, are touched upon in the same Title. Joint and several liability, or as the modern civilians term it, Correality or Solidarity, is briefly noticed in Title 16, because whenever it arose ex contractu it usually took the form of stipulation. In Title 17 we have a statement of the effect of promises made by stipulation to a slave: a subject treated in relation to obligations generally, and to persons in patria as well as dominica potestas, in Title 28. Title 18 relates to a classification of stipulations according as they are based upon genuine consent, or are forced upon a party by a judge or magistrate, and so reminds the reader of the traditional division of contracts in English law into ' contracts of record ' and contracts in the ordinary sense of the term. This is followed in Title 19 by an ill-arranged exposition of circumstances which affect the validity of contracts in general, and of stipulations in particular, such as illegality, impossibility, infancy, and weakness of intellect ; and here too we have a precise statement of the jural maxim that an obligation is a tie between ascertained parties, incapable of conferring rights or imposing liabilities on others who are not parties to it themselves, and Justinian's own repeal of some previously existing rules invalidating stipulations, but out of harmony with the modern principle that ' consent is the essence of contract '. Title 20 relates to fideiussio, a form of suretyship effected by stipulation ; other modes in which this important relation could be established are described in the notes to this Title and Title 26. Title 21, professedly on literal contract, tells us little more than that literal contract in the true sense (expensilatio) had long been obsolete, though it also touches a subject upon which more is said in Excursus VIII inf.—the defence of no consideration. The five succeeding Titles contain a very full treatment of the important class of contracts called consensual. In the

first, their characteristic features, as contrasted with those of stipulation and Real contract, are tersely noticed. Sale is considered in Title 23; the principles relating to the moment at which the contract is held to be concluded, the necessity of the price being fixed and in money, and the 'periculum rei', are clearly set forth, together with one or two changes made in the law by Justinian himself, and an incidental notice of a subject touched upon elsewhere in this part of the book, the doctrine of negligence in contractual relations. Locatio conductio, or hire, is discussed upon much the same lines in Title 24, and in Title 25 are described the chief forms of partnership, the relations of partners inter se, and the modes in which this contract is determined. Title 26 is upon the subject of agency, the species of which are classified according to the variations in the persons benefited by the agent's commission; the modes in which that commission terminates, and the reciprocal duties of agent and principal, are also noticed. The question which is of so much practical importance in modern law, namely the capacity of the agent to bind and entitle his principal, is passed over in silence, but is treated at some length in Excursus IX inf. Quasi-contractual obligations are illustrated in Title 27 by negotiorum gestio, indebiti solutio, joint ownership and inheritance, and the relations of guardian and ward, heir and legatee; and Title 29 deals with the discharge of obligations, and more particularly of those which arise ex contractu; the chief modes described are performance, accord and satisfaction, release, and substituted agreement. Assignment, of which some treatment might have been looked for, is discussed in the Excursus (V) on the general nature of obligations.

The description here given of the Roman contract system—if we may use that expression to indicate the aggregate of actionable agreements—is somewhat misleading. It must not be supposed that in the time of Justinian, or even of Gaius, no agreement was ground to support an action which was neither expressed in the form of stipulation, nor belonged to one or other of the classes of Real and Consensual contracts. There had been a considerable advance in two directions since the time when usage had restricted the term 'contract' to denote the four classes of agreement enumerated in Title 13. Between the establishment of the Empire and the age of the last great classical jurists the principle of the Real contracts had received a great development by the recognition of the rule, that where one party to any agreement whatsoever had performed what he had undertaken, he had always a remedy by action to enforce

performance by the other. This great group of so-called 'innominate' contracts is treated in a note on Title 14. 4. New contracts, though not so called, which in effect were consensual, were called into existence at different times by the Edict and imperial action; constitutum (note on iii. 20. 8) is the great example of the former; emphyteusis (pp. 323–325 supr.) and donatio (ii. 7) of the latter. And lastly, though this matter is disputed (Excursus V), it may be true that from the theory of 'natural' obligation every agreement whatsoever came to receive all the legal attributes possessed by even the oldest of the Roman contracts, except that of exposing the promisor to an action for the enforcement of his promise.

LIBER TERTIUS

I

DE HEREDITATIBUS QUAE AB INTESTATO DEFERUNTUR

INTESTATUS decedit, qui aut omnino testamentum non fecit aut non iure fecit aut id quod fecerat ruptum irritumve factum est aut nemo ex eo heres extitit.

Intestatorum autem **hereditates ex lege duodecim tabu-** 1 G. iii. 1.
larum primum ad suos heredes pertinent. Sui autem heredes 2 G. iii. 2.
existimantur, ut et supra diximus, **qui in potestate morientis fuerunt: veluti filius filia, nepos neptisve ex filio, pronepos proneptisve ex nepote filio nato prognatus prognatave. nec interest, utrum naturales sunt liberi an adoptivi.** Quibus 2a
connumerari necesse est etiam eos, qui ex legitimis quidem matrimoniis non sunt progeniti, curiis tamen civitatum dati secundum divalium constitutionum, quae super his positae sunt, tenorem suorum iura nanciscuntur: nec non eos, quos nostrae amplexae sunt constitutiones, per quas iussimus, si quis mulierem in suo contubernio copulaverit non ab initio affectione maritali, eam tamen, cum qua poterat habere

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Tit. I. For the precise meaning of testamentum non iure factum, ruptum, irritum, and destitutum see on Bk. ii. 17 pr. supr.

§ **1.** The Twelve Tables, whose words ran 'si intestatus moritur, cui suus heres nec escit, agnatus proximus familiam habeto', did not conceive the succession of a suus heres as a succession at all, but as a continuation of a common proprietorship whose exercise had lain dormant during the lifetime of the deceased paterfamilias: cf. Gaius ii. 157, Bk. ii. 19. 2 supr., and § 3 inf. 'quasi continuatur dominium', Dig. 28. 2. 11 'in suis heredibus evidentius apparet, continuationem dominii eo rem perducere, ut nulla videatur hereditas fuisse, quasi olim hi domini essent, qui etiam vivo patre quodammodo heredes existimantur: . . . itaque post mortem patris non hereditatem percipere videntur, sed magis liberam bonorum administrationem consequuntur'.

§ **2.** For the modes of legitimising illegitimate children see on Bk. i. 10. 13 pr.: the note on which section will also explain the words 'qui et his, qui postea nati sunt, occasionem legitimi nominis praestiterunt'.

coniugium, et ex ea liberos sustulerit, postea vero affectione
procedente etiam nuptialia instrumenta cum ea fecerit filios-
que vel filias habuerit: non solum eos liberos, qui post dotem
editi sunt, iustos et in potestate esse patribus, sed etiam
anteriores, qui et his qui postea nati sunt occasionem legitimi
nominis praestiterunt: quod optinere censuimus, etiamsi non
progeniti fuerint post dotale instrumentum confectum liberi
G.iii.2. 2b vel etiam nati ab hac luce subtracti fuerint. **Ita demum tamen
nepos neptisve et pronepos proneptisve suorum heredum
numero sunt, si praecedens persona desierit in potestate parentis
esse, sive morte id acciderit sive alia ratione, veluti emanci-
patione: nam si per id tempus, quo quis moreretur, filius
in potestate eius sit, nepos ex eo suus heres esse non potest.**
idque **et in ceteris deinceps liberorum personis dictum intel-**
G. iii. 4. **legimus. postumi quoque, qui, si vivo parente nati essent,**
3 **in potestate futuri forent, sui heredes sunt.** Sui autem etiam
ignorantes fiunt heredes et, licet furiosi sint, heredes possunt
existere: quia quibus ex causis ignorantibus adquiritur nobis,
ex his causis et furiosis adquiri potest. et statim morte
parentis quasi continuatur dominium: et ideo nec tutoris
auctoritate opus est in pupillis, cum etiam ignorantibus
adquiritur suis heredibus hereditas: nec curatoris consensu
4 adquiritur furioso, sed ipso iure. Interdum autem, licet in
potestate mortis tempore suus heres non fuit, tamen suus
heres parenti efficitur, veluti si ab hostibus quis reversus fuerit
5 post mortem patris sui: ius enim postliminii hoc facit. Per
contrarium evenit ut, licet quis in familia defuncti sit mortis
tempore, tamen suus heres non fiat, veluti si post mortem
suam pater iudicatus fuerit reus perduellionis ac per hoc

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§ 3. Sui heredes, however, could not be prejudiced against their will by a damnosa hereditas, as they enjoyed the praetorian 'beneficium abstinendi' whether called to succeed under a will or ab intestato: see Bk. ii. 19. 2 and notes supr.

§ 4. For the ius postliminii see on Bk. i. 12. 5 supr.

§ 5. Of the term perduellio Festus says 'hostis apud antiquos peregrinus dicebatur, et qui nunc hostis perduellio': the offence is defined in Dig. 48. 4. 11 'perduellionis reus hostili animo adversus rempublicam vel principem animatus'. Theophilus remarks that it was the only crime for which a man could be proceeded against after his decease: cf. note on Bk. iv. 18. 3 inf.

memoria eius damnata fuerit: suum enim heredem habere non potest, cum fiscus ei succedit. sed potest dici ipso iure esse suum heredem, sed desinere. **Cum filius filiave et ex** 6 G. iii. 7.
altero filio nepos neptisve extant, pariter ad hereditatem vocantur nec qui gradu proximior est ulteriorem excludit: aequum enim esse videtur **nepotes neptesque in patris sui locum succedere. pari ratione et si nepos neptisque sit ex filio et ex nepote pronepos proneptisve, simul vocantur. et** G. iii. 8.
quia placuit nepotes neptesque, item pronepotes proneptesque in parentis sui locum succedere, conveniens esse visum est non in capita, sed in stirpes hereditatem dividi, ut filius partem dimidiam hereditatis habeat et ex altero filio duo pluresve nepotes alteram dimidiam. item si ex duobus filiis nepotes extant et ex altero unus forte aut duo, ex altero tres aut quattuor, ad unum aut duos dimidia pars pertinet, ad tres vel ad quattuor altera dimidia. Cum autem quaeritur, an quis 7
suus heres existere potest: eo tempore quaerendum est, quo certum est aliquem sine testamento decessisse: quod accidit et destituto testamento. hac ratione si filius exheredatus fuerit et extraneus heres institutus est, filio mortuo postea certum fuerit heredem institutum ex testamento non fieri heredem, aut quia noluit esse heres aut quia non potuit: nepos avo suus heres existet, quia quo tempore certum est intestatum decessisse patrem familias, solus invenitur nepos. et hoc certum est. Et licet post mortem avi natus sit, tamen 8
avo vivo conceptus, mortuo patre eius posteaque deserto avi testamento suus heres efficitur. plane si et conceptus et natus fuerit post mortem avi, mortuo patre suo desertoque postea avi testamento suus heres avo non existit, quia nullo iure

§ 6. For a discussion of the two systems of division, per capita and per stirpes, see Maine, Early History of Institutions, p. 195.

§ 7. What is meant is that the persons who would be sui heredes at the moment of the decease may not exactly correspond with those who would occupy that position at the moment when it first becomes certain that the man has died intestate, and that, where there is a difference, it is the latter who take, not the former. E. g. A dies, having instituted B, an extraneus, and leaving two sui, C and D: if, before B refuses the inheritance, C gives himself in adrogation, D will succeed to the whole on B's refusal, for at the time when the sui are to be ascertained C has ceased to be a suus by having undergone capitis deminutio.

cognationis partem sui patris tetigit. sic nec ille est inter liberos avo, quem filius emancipatus adoptaverat. hi autem cum non sunt quantum ad hereditatem liberi, neque bonorum possessionem petere possunt quasi proximi cognati. haec de suis heredibus.

9 Emancipati autem liberi iure civili nihil iuris habent : neque enim sui heredes sunt, quia in potestate esse desierunt parentis, neque alio ullo iure per legem duodecim tabularum vocantur. sed praetor naturali aequitate motus dat eis
G. iii. 26. bonorum possessionem unde liberi, **perinde ac si in potestate parentis mortis tempore fuissent, sive soli sint sive** cum suis heredibus **concurrant.** itaque duobus liberis extantibus, emancipato et qui mortis tempore in potestate fuerit, sane quidem is qui in potestate fuerit solus iure civili heres est, id est solus suus heres est : sed cum emancipatus beneficio praetoris in partem admittitur, evenit, ut suus heres pro parte

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§ 9. The old civil law of intestate succession regarded agnatic relationship exclusively : those only who were in the agnatic family of a deceased person could succeed him. Thus those whom natural reason and more refined law deem nearer relations were often excluded by persons to whom later they would have been preferred : sons or daughters might be postponed to a distant cousin, because by being emancipated or given in adoption they had been capite deminuti, and so ceased to be agnatic kindred of their own father. These anomalies, as they seem to us, were but gradually corrected. Arranging the persons who possessed rights of intestate succession to a deceased in classes according to priority, so that the first excludes the second, the second the third, and so on, the first class under the old law, as we have seen, consisted of the sui. It was enlarged by the action of the praetor, whose mode of intervention has already been alluded to on Bk. ii. 10. 2 supr. He could not affect the hereditas, which was altogether beyond his control : but he could promise the bonorum possessio to whomsoever he pleased : and by promising it, in the first instance, to liberi of the deceased, he practically added persons to the class of sui who by the civil law had no claim whatever. 'Liberi' are those (natural, § 12 inf.) descendants of a deceased man who either are, or would be, sui (had they been able to be in potestas) if they had not been emancipated or given in adoptio plena, Gaius iii. 26 : though while in the adoptive family they could not claim to succeed their natural father, § 10 inf. Thus children are not 'liberi' in relation to their mother, their maternal grandfather, and so on. The principle was analogous to that of the civil law : no descendant could claim bonorum possessio in this class, if another stood between him and the deceased, exactly as no one is a suus heres who is not in the immediate power of the paterfamilias. It admitted of one excep-

heres fiat. At hi, qui emancipati a parente in adoptionem 10
se dederunt, non admittuntur ad bona naturalis patris quasi liberi, si modo cum is moreretur in adoptiva familia sint. nam vivo eo emancipati ab adoptivo patre perinde admittuntur ad bona naturalis patris, ac si emancipati ab ipso essent nec umquam in adoptiva familia fuissent: et convenienter quod ad adoptivum patrem pertinet extraneorum loco esse incipiunt. post mortem vero naturalis patris emancipati ab adoptivo et quantum ad hunc aeque extraneorum loco fiunt et quantum ad naturalis parentis bona pertinet nihilo magis liberorum gradum nanciscuntur: quod ideo sic placuit, quia iniquum erat esse in potestate patris adoptivi, ad quos bona naturalis patris pertinerent, utrum ad liberos eius an ad
adgnatos. Minus ergo iuris habent adoptivi quam naturales. 11
namque naturales emancipati beneficio praetoris gradum liberorum retinent, licet iure civili perdunt: adoptivi vero emancipati et iure civili perdunt gradum liberorum et a praetore non adiuvantur. et recte: naturalia enim iura civilis ratio peremere non potest nec, quia desinunt sui heredes esse, desinere possunt filii filiaeve aut nepotes neptesve esse: adoptivi vero emancipati extraneorum loco incipiunt esse, quia ius nomenque filii filiaeve, quod per adoptionem consecuti sunt, alia civili ratione, id est emancipatione, perdunt.

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tion. If a son were emancipated, while his children were retained in the grandfather's power, the latter were sui, and entitled by the Twelve Tables; on the praetorian system the son would naturally exclude them. To admit both the son and the grandchildren to independent shares would have wronged other liberi: accordingly, by what is called the nova clausula Iuliani, the son was allowed to take the portion which he would have received had he not been emancipated, on condition of transferring a moiety to his children, Dig. 37. 8. 1 pr.

Liberi who were not sui could claim bonorum possessio as such only on condition of making a collatio bonorum (see on Bk. ii. 19. 5 supr.), Coll. 16. 7, though bona castrensia and quasi castrensia were excepted from hotchpot because they would have been the son's own had he not been emancipated at all, Dig. 37. 6. 1. 15. So too a daughter must make a collatio of her dos, whether she took as bonorum possessor or heres, Dig. 37. 6. 1 pr.

§ **10**. Non . . . quasi liberi: but they are admitted in another order, as cognati, 13 inf.

§ **11**. For the dictum 'naturalia iura civilis ratio peremere non potest' see on Bk. i. 15. 3 supr.

12 Eadem haec observantur et in ea bonorum possessione, quam contra tabulas testamenti parentis liberis praeteritis, id est neque heredibus institutis neque ut oportet exheredatis, praetor pollicetur. nam eos quidem, qui in potestate parentis mortis tempore fuerunt, et emancipatos vocat praetor ad eam bonorum possessionem: eos vero, qui in adoptiva familia fuerunt per hoc tempus, quo naturalis parens moreretur, repellit. item adoptivos liberos emancipatos ab adoptivo patre sicut ab intestato, ita longe minus contra tabulas testamenti ad bona eius admittit, quia desinunt in liberorum numero
13 esse. Admonendi tamen sumus eos, qui in adoptiva familia sunt quive post mortem naturalis parentis ab adoptivo patre emancipati fuerint, intestato parente naturali mortuo licet ea parte edicti, qua liberi ad bonorum possessionem vocantur, non admittantur, alia tamen parte vocari, id est qua cognati defuncti vocantur. ex qua parte ita admittuntur, si neque sui heredes liberi neque emancipati obstent neque adgnatus quidem ullus interveniat: ante enim praetor liberos vocat tam suos heredes quam emancipatos, deinde legitimos heredes,
14 deinde proximos cognatos. Sed ea omnia antiquitati quidem placuerunt: aliquam autem emendationem a nostra constitutione acceperunt, quam super his personis posuimus, quae a patribus suis naturalibus in adoptionem aliis dantur. invenimus etenim nonnullos casus, in quibus filii et naturalium parentum successionem propter adoptionem amittebant et adoptione facile per emancipationem soluta ad neutrius patris successionem vocabantur. hoc solito more corrigentes constitutionem scripsimus, per quam definivimus, quando parens naturalis filium suum adoptandum alii dederit, integra omnia

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§ 12. See on Bk. ii. 13 pr. supr.

§ 13. For the rights of cognates see Tit. 5 and notes, inf. The rule here stated did not apply even before Justinian if the effect of the adoption was not to transfer the adoptatus to a new cognatic family, as e. g. where he was adopted by a paternal ascendant: here he ranked among liberi, Dig. 37. 4. 3. 7 and 8; ib. 21. 1. So too if a paterfamilias, after emancipating a son, gave himself in adrogation, the son did not lose his right of succeeding in the first class, Dig. loc. cit. 3. 9.

§ 14. The SC. Afinianum had enacted that if a father gave one of three sons in adoption, the adoptive father must leave him a fourth of his property at least, even though he emancipated him. For Justinian's

iura ita servari, atque si in patris naturalis potestate permansisset nec penitus adoptio fuerit subsecuta: nisi in hoc tantummodo casu, ut possit ab intestato ad patris adoptivi venire successionem. testamento autem ab eo facto neque iure civili neque praetorio aliquid ex hereditate eius persequi potest neque contra tabulas bonorum possessione agnita neque inofficiosi querella instituta, cum nec necessitas patri adoptivo imponitur vel heredem eum instituere vel exheredatum facere utpote nullo naturali vinculo copulatum. neque si ex Afiniano senatus consulto ex tribus maribus fuerit adoptatus: nam et in huiusmodi casu neque quarta ei servatur nec ulla actio ad eius persecutionem ei competit. nostra autem constitutione exceptus est is, quem parens naturalis adoptandum susceperit: utroque enim iure tam naturali quam legitimo in hanc personam concurrente pristina iura tali adoptioni servavimus, quemadmodum si pater familias sese dederit adrogandum. quae specialiter et singillatim ex praefatae constitutionis tenore possunt colligi.

Item vetustas ex masculis progenitos plus diligens solos 15
nepotes vel neptes, qui ex virili sexu descendunt, ad suorum vocabat successionem et iuri adgnatorum eos anteponebat: nepotes autem, qui ex filiabus nati sunt, et pronepotes ex neptibus cognatorum loco numerans post adgnatorum lineam eos vocabat tam in avi vel proavi materni quam in aviae

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changes in the law of adoption (Cod. 8. 48. 10) see on Bk. i. 11. 2 supr. Their result, so far as relates to intestate succession, was as follows:

(1) If the adoptio was minus plena, the adoptatus retained all his rights against the estate of his natural father, and acquired besides a claim as suus to that of the adoptive father, if he died intestate, though none to that of the latter's agnates. To the property of the adoptatus the adoptans had no rights of succession whatever. (2) If the adoptio was plena, the rights of the adoptatus against the property of both his patres and that of his mother remained unaltered. As to his relation to his natural father's inheritance there is some difference of opinion, though the expression in the text (pristina iura tali adoptioni servavimus) coupled with the whole tenor of Cod. 8. 48. 10, and Bk. i. 11. 2 supr. may be taken as conclusive.

§ 15. The enactments referred to are those of Valentinian, Theodosius, and Arcadius in Cod. 6. 55. 9 and Cod. Theod. 5. 1. 4 (A. D. 389): they provided that grandchildren and still remoter descendants should rank as liberi of their maternal grandparents or paternal grandmother, etc., in lieu

vel proaviae sive paternae sive maternae successionem. divi autem principes non passi sunt talem contra naturam iniuriam sine competenti emendatione relinquere: sed cum nepotis et pronepotis nomen commune est utrisque, qui tam ex masculis quam ex feminis descendunt, ideo eundem gradum et ordinem successionis eis donaverunt: sed ut aliquid amplius sit eis, qui non solum naturae, sed etiam veteris iuris suffragio muniuntur, portionem nepotum et neptium vel deinceps, de quibus supra diximus, paulo minuendam esse existimaverunt, ut minus tertiam partem acciperent, quam mater eorum vel avia fuerat acceptura, vel pater eorum vel avus paternus sive maternus, quando femina mortua sit cuius de hereditate agitur, hisque, licet soli sint, adeuntibus adgnatos minime vocabant. et quemadmodum lex duodecim tabularum filio mortuo nepotes vel neptes vel pronepotes et proneptes in locum patris sui ad successionem avi vocat: ita et principalis

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of their mother, father, etc., their portion, however, being diminished by one third in favour of liberi admitted by the earlier law, or if there were none, by one fourth in favour of the agnates. This last deduction was abolished by Justinian in Cod. 6. 55. 12, and that of the third by Nov. 18. 4.

It may be as well to state briefly the rules of intestate succession where the deceased was a filiusfamilias with peculium or an emancipatus. In respect of peculium adventitium, Theodosius and Valentinian enacted that (1) bona materna should go to the pater, (2) lucra nuptialia to the children of the deceased filiusfamilias, the pater having the usufruct for life: in default of children to the pater, and failing him to brothers and sisters. Leo and Anthemius postponed the pater to brothers and sisters, even of the half blood. Justinian extended these rules relating to bona nuptialia to bona materna and materni generis in their integrity, Cod. 6. 59. 11, and later still to all peculium adventitium from whatever source derived.

For the earlier law relating to peculium castrense see on Bk. ii. 9 pr. supr. In Justinian's time brothers and sisters as well as children of the deceased were preferred to the pater (Bk. ii. 12 pr. supr. 'si vero intestati decesserint, nullis liberis vel fratribus superstitibus, ad parentes eorum iure communi pertinebit': cf. Cod. 6. 61. 3 and 4), who took the peculium only if there were none to precede him. The same rules governed the succession to peculium quasi castrense.

If, finally, an emancipatus died intestate, the parens manumissor under the old law had stood next after the sui, as being patron (Tit. 7 inf.). Gratian and later emperors preferred the children of an emancipated daughter (who of course neither were nor ranked as sui) to the parens

dispositio in locum matris suae vel aviae eos cum iam designata partis tertiae deminutione vocat. Sed nos, cum adhuc 16
dubitatio manebat inter adgnatos et memoratos nepotes, partem quartam defuncti substantiae adgnatis sibi vindicantibus ex cuiusdam constitutionis auctoritate, memoratam quidem constitutionem a nostro codice segregavimus neque inseri eam ex Theodosiano codice in eo concessimus. nostra autem constitutione promulgata toti iuri eius derogatum est: et sanximus talibus nepotibus ex filia vel pronepotibus ex nepte et deinceps superstitibus adgnatos nullam partem mortui successionis sibi vindicare, ne hi, qui ex transversa linea veniunt, potiores his habeantur, qui recto iure descendunt. quam constitutionem nostram optinere secundum sui vigorem et tempora et nunc sancimus: ita tamen ut, quemadmodum inter filios et nepotes ex filio antiquitas statuit non in capita sed in stirpes dividi hereditatem, similiter nos inter filios et nepotes ex filia distributionem fieri iubemus, vel inter omnes nepotes et neptes et alias deinceps personas, ut

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manumissor, Cod. Theod. 5. 1. 3: Anastasius allowed family rights to be reserved in emancipation by imperial rescript, Cod. 6. 58. 11: see on Bk. i. 12. 6 supr. Through Justinian's abolition of the old form of emancipation the pater's rights of succession, *qua* patron, and the connected bonorum possessio unde decem personae (Tit. 9. 4 inf.) disappeared, and in his system the order of succession to an emancipatus is, first, liberi, second, the pater, Bk. i. 12. 6 supr.; Tit. 9. 4 inf. If, however, the deceased left surviving him, besides the pater, a mother and brothers or sisters, the proprietas belonged to the brothers or sisters, the usufruct in thirds to them, the father and the mother respectively: if he left no mother, but brothers or sisters as well as the pater, the latter had the usufruct, the former the proprietas, of the whole.

Under Justinian consequently (before the changes effected by Nov. 118, for which see on Tit. 9. 9 inf., and omitting the cases of filiusfamilias and emancipatus just considered), the following persons, though owing their respective titles historically to different legislative organs, ranked in the first class as successors on an intestacy, viz. sui (Twelve Tables), liberi (Edict), and grandchildren by a deceased daughter (Cod. Theod. 5. 1. 4). If the deceased were a woman, as she could have no sui or liberi in the technical sense, there was, strictly speaking, no first class to succeed her: the first right belonged to her children by the SC. Orfitianum, Tit. 4 inf., and to grandchildren by issue deceased, all of whom the Romans themselves rank in the second class as legitimi: see the next Title.

§ 16. For the 'pars quarta' see note on § 15, ad init.

utraque progenies matris suae vel patris, aviae vel avi portionem sine ulla deminutione consequantur, ut, si forte unus vel duo ex una parte, ex altera tres aut quattuor extent, unus aut duo dimidiam, alteri tres aut quattuor alteram dimidiam hereditatis habeant.

II

DE LEGITIMA ADGNATORUM SUCCESSIONE

Si nemo suus heres vel eorum, quos inter suos heredes praetor vel constitutiones vocant, extat et successionem quo-
G. iii. 9. quo modo amplectatur: **tunc ex lege duodecim tabularum**
1 **ad adgnatum** proximum **hereditas pertinet.** Sunt autem
G. iii. 10. **adgnati,** ut primo quoque libro tradidimus, cognati per **virilis sexus personas cognatione iuncti,** quasi a patre cognati. **itaque eodem patre nati fratres adgnati sibi sunt, qui et consanguinei vocantur, nec requiritur, an etiam eandem matrem habuerint. item patruus fratris filio et invicem is illi adgnatus est. eodem numero sunt fratres patrueles, id est qui ex duobus fratribus** procreati **sunt,** qui etiam **consobrini** vocantur. qua ratione etiam ad plures gradus adgnationis pervenire poterimus. hi quoque, qui post mortem patris
G. iii. 11. nascuntur, nanciscuntur consanguinitatis iura. **non tamen omnibus simul adgnatis dat lex hereditatem, sed his, qui tunc proximo gradu sunt, cum certum esse** coeperit **aliquem**
2 **intestatum decessisse.** Per adoptionem quoque adgnationis

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Tit. II. 1. For the precise meaning of 'agnate' see on Tit. 1. 15. 1 supr. The rule of the Twelve Tables, which, in default of sui, gave the succession to the nearest agnate or agnates in the same degree, was so strictly construed, that if he or they were unable or refused to take the inheritance, more remote agnates were not admitted as such, nor were the gentiles, to whom the inheritance was given only 'si adgnatus nec escit'; it escheated to the Treasury: see §§ 5 and 7 infr., cf. Gaius iii. 12 'nec in eo iure successio est: ideoque si adgnatus proximus hereditatem omiserit, vel antequam adierit decesserit, sequentibus nihil iuris ex lege competit'. Perhaps the hardship of this was to some extent mitigated by the anomalous right which the nearest agnate enjoyed of transferring his right of aditio by in iure cessio, Gaius ii. 35, p. 266 supr. The degrees of agnation were calculated in the same way as those of cognation, each generation as one degree of removal, Tit. 6. 8 inf. For the significance of the expression 'cum certum esse coeperit aliquem intestatum decessisse' see on Tit. 1. 7 supr. and Mr. Poste's note on Gaius iii. 13.

ius consistit, veluti inter filios naturales et eos quos pater eorum adoptavit (nec dubium est, quin proprie consanguinei appellentur): item si quis ex ceteris adgnatis tuis, veluti frater aut patruus aut denique is qui longiore gradu est, aliquem adoptaverit, adgnatos inter suos esse non dubitatur.
Ceterum inter masculos quidem adgnationis iure hereditas **3**
etiam longissimo gradu ultro citroque capitur. **quod ad** G. iii. 14.
feminas vero ita placebat, ut ipsae consanguinitatis iure tantum capiant hereditatem, si sorores sint, ulterius non capiant: masculi vero ad earum hereditates, etiam si longissimo gradu sint, admittantur. qua de causa fratris tui aut patrui tui filiae vel amitae tuae hereditas ad te pertinet, tua vero ad illas non pertinebat. quod ideo ita constitutum erat, quia commodius videbatur ita iura constitui, ut plerumque hereditates ad masculos confluerent. sed quia sane iniquum erat in universum eas quasi extraneas repelli, praetor eas ad bonorum possessionem admittit ea parte, qua proximitatis nomine bonorum possessionem pollicetur: ex qua parte ita scilicet admittuntur, si neque adgnatus ullus nec proximior
cognatus interveniat. Et haec quidem lex duodecim tabu- **3a**
larum nullo modo introduxit, sed simplicitatem legibus amicam amplexa simili modo omnes adgnatos sive masculos sive feminas cuiuscumque gradus ad similitudinem suorum invicem ad successionem vocabat: media autem iurisprudentia, quae erat lege quidem duodecim tabularum iunior, imperiali autem dispositione anterior, suptilitate quadam excogitata praefatam differentiam inducebat et penitus eas a successione adgnatorum repellebat, omni alia successione incognita, donec praetores, paulatim asperitatem iuris civilis corrigentes sive quod deest adimplentes, humano proposito alium ordinem suis edictis addiderunt et cognationis linea proximitatis nomine introducta per bonorum possessionem

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§ 3. The rule that female agnates were not entitled to succeed as such if more remotely related to the deceased than as sisters of the whole blood was due to what Justinian calls the media iurisprudentia, being based on the principle which either before or later was embodied in the lex Voconia: 'feminae ad hereditates legitimas ultra consanguineas successiones non admittuntur, idque iure civili Voconiana ratione videtur effectum: ceterum lex duodecim tabularum nulla discretione sexus adgnatos admittit'

eas adiuvabant et pollicebantur his bonorum possessionem,
3b quae unde cognati appellatur. Nos vero legem duodecim tabularum sequentes et eius vestigia in hac parte conservantes laudamus quidem praetores suae humanitatis, non tamen eos in plenum causae mederi invenimus: quare etenim uno eodemque gradu naturali concurrente et adgnationis titulis tam in masculis quam in feminis aequa lance constitutis masculis quidem dabatur ad successionem venire omnium adgnatorum, ex adgnatis autem mulieribus nullis penitus nisi soli sorori ad adgnatorum successionem patebat aditus? ideo in plenum omnia reducentes et ad ius duodecim tabularum eandem dispositionem exaequantes nostra constitutione sanximus omnes legitimas personas, id est per virilem sexum descendentes, sive masculini sive feminini generis sunt, simili modo ad iura successionis legitimae ab intestato vocari secundum gradus sui praerogativam nec ideo excludendas,
4 quia consanguinitatis iura sicuti germanae non habent. Hoc etiam addendum nostrae constitutioni existimavimus, ut transferatur unus tantummodo gradus a iure cognationis in legitimam successionem, ut non solum fratris filius et filia secundum quod iam definivimus ad successionem patrui sui vocentur, sed etiam germanae consanguineae vel sororis uterinae filius et filia soli et non deinceps personae una cum his ad iura avunculi sui perveniant et mortuo eo, qui patruus quidem est fratris sui filiis, avunculus autem sororis suae suboli, simili modo ab utroque latere succedant, tamquam si omnes ex masculis descendentes legitimo iure veniant, scilicet ubi frater et soror superstites non sunt (his etenim personis

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Paul. Sent. Rec. 4. 9. 22. Remoter female agnates than sisters had a praetorian title only; they could obtain bonorum possessio in the third rank, as cognates (proximitatis nomine), unless excluded by nearer relations of the same class. Justinian's enactment restoring to them their original rights is in Cod. 6. 58. 14.

§ 4. Into the second order of succession, which goes generally by the name of legitimi, and which (omitting the patron) consisted by the old law of the nearest agnates only, were admitted by successive changes, though in different degrees of priority:

(1) The deceased's mother if she had the ius liberorum, Tit. 3. inf.

(2) The children of a deceased woman, Tit. 4 inf., though these practically belonged to the first class, as no one was preferred to them; see on Tit. 1. 15 supr. ad fin.

praecedentibus et successionem admittentibus ceteri gradus remanent penitus semoti): videlicet hereditate non ad stirpes, sed in capita dividenda. Si plures sint gradus adgnatorum, 5
aperte lex duodecim tabularum proximum vocat: itaque **si** G. iii. 15.
verbi gratia **sit frater** defuncti **et alterius fratris filius** aut patruus, **frater potior** habetur. et quamvis singulari numero usa lex proximum vocet, tamen dubium non est, quin et, si plures sint eiusdem gradus, omnes admittantur: nam et proprie proximus ex pluribus gradibus intellegitur et tamen dubium non est, quin, licet unus sit gradus adgnatorum, pertineat ad eos hereditas. **Proximus** autem, si quidem nullo 6
testamento facto quisque decesserit, per hoc tempus requiritur, quo mortuus est is cuius de hereditate quaeritur. quod **si** G. iii. 13.
facto testamento quisquam **decesserit**, per hoc tempus requi-

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(3) Brothers and sisters of the deceased who had been capite minuti, though by the enactment of Anastasius (Cod. 5. 30. 4), by which this right was given them, they were allowed to take only half as much as those who were adgnati; this restriction was removed by Justinian, Cod. 6. 58. 15. 1. If emancipated (i. e. capite minuti) brothers and sisters were dead, their children were admitted by Justinian in their place along with the issue of those who had died without having been capite minuti, Cod. 6. 58. 15. 3.

(4) Uterine brothers and sisters of the deceased (Cod. 6. 56. 7, Justinian), but by Nov. 84 the whole was preferred to the half blood.

(5) Children of a deceased sister, Cod. 6. 58. 15. 1, and this section.

Taking in combination with these changes the enactment of Justinian which introduced successio ordinum among agnates (§ 7 inf.), the second class under his system, before Nov. 118, consisted of the following persons, in the following order of priority:

i. The mother (SC. Tertullianum) and brothers and sisters of the whole blood, whether agnates of the deceased (Twelve Tables) or not (Cod. 6. 58. 15. 1).

ii. Brothers and sisters of the half blood (Twelve Tables and Cod. 6. 56. 7).

iii. Agnates in the next degree after brothers and sisters, whether male (Twelve Tables) or female (Cod. 6. 58. 14), and the sons and daughters of deceased brothers and sisters, whether the latter were related to the deceased by the whole or the half blood, and whether they were his agnates or not.

iv. Male and female agnates of remoter degrees, according to proximity (§ 7). Where there were several persons entitled equally, as legitimi, the division was always per capita (this section, ad fin.), i. e. the principle of representation of parents by children ad infinitum, which held in succession by the first order, had here no application.

ritur, quo **certum esse coeperit** nullum **ex testamento heredem** extaturum: tum enim proprie quisque intellegitur intestatus decessisse. quod quidem aliquando longo tempore declaratur: in quo spatio temporis saepe accidit, ut proximiore mortuo proximus esse incipiat, qui moriente testatore non erat proxi-
G. iii. 12. 7 mus. Placebat autem **in eo** genere percipiendarum hereditatum **successionem non esse,** id est ut, quamvis **proximus,** qui secundum ea quae diximus vocatur ad hereditatem, aut spreverit, **hereditatem** aut **antequam adeat decesserit,** nihilo magis legitimo iure **sequentes** admittuntur. quod iterum praetores imperfecto iure corrigentes non in totum sine adminiculo relinquebant, sed ex cognatorum ordine eos vocabant, utpote adgnationis iure eis recluso. sed nos nihil deesse perfectissimo iuri cupientes nostra constitutione sanximus, quam de iure patronatus humanitate suggerente protulimus, successionem in adgnatorum hereditatibus non esse eis denegandam, cum satis absurdum erat, quod cognatis a praetore apertum est, hoc adgnatis esse reclusum, maxime cum in onere quidem tutelarum et primo gradu deficiente sequens succedit et, quod in onere optinebat, non erat in lucro permissum.

8 Ad legitimam successionem nihilo minus vocatur etiam parens, qui contracta fiducia filium vel filiam, nepotem vel neptem ac deinceps emancipat. quod ex nostra constitutione omnimodo inducitur, ut emancipationes liberorum semper videantur contracta fiducia fieri, cum apud antiquos non aliter hoc optinebat, nisi specialiter contracta fiducia parens manumisisset.

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§ 7. For the last lines of this section cf. Bk. i. 17 and notes supr. According to Gaius iii. 28 some lawyers of his own day thought that successio ordinum among agnates was introduced by the Edict: but from the text it seems clear that they were wrong.

§ 8. Under the old system of emancipation (p. 145 supr.), if the final manumission of the child was made by the fictitious vendee, the latter technically became patron; hence it was usual for him to agree (contracta fiducia) to hold the iura patronatus in trust for the father. By Cod. 8. 49. 6 Justinian enacted that every emancipation under his new form should have the same effects, in respect of guardianship and succession (subject to other intermediate changes, see on Tit. 1. 15 supr.) as if it had been effected by the father himself under the old method.

III

DE SENATUS CONSULTO TERTULLIANO

Lex duodecim tabularum ita stricto iure utebatur et praeponebat masculorum progeniem et eos, qui per feminini sexus necessitudinem sibi iunguntur, adeo expellebat, ut ne quidem inter matrem et filium filiamve ultro citroque hereditatis capiendae ius daret, nisi quod praetores ex proximitate cognatorum eas personas ad successionem bonorum possessione unde cognati accommodata vocabant. Sed hae 1
iuris angustiae postea emendatae sunt. et primus quidem divus Claudius matri ad solacium liberorum amissorum legitimam eorum detulit hereditatem. Postea autem senatus 2
consulto Tertulliano, quod divi Hadriani temporibus factum est, plenissime de tristi successione matri, non etiam aviae deferenda cautum est: ut mater ingenua trium liberorum ius habens, libertina quattuor ad bona filiorum filiarumve admittatur intestatorum mortuorum, licet in potestate parentis est, ut scilicet, cum alieno iuri subiecta est, iussu eius adeat cuius iuri subiecta est. Praeferuntur autem matri liberi 3
defuncti, qui sui sunt quive suorum loco, sive primi gradus sive ulterioris. sed et filiae suae mortuae filius vel filia

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Tit. III. The only claim which a woman had to succeed to her children on intestacy by the Twelve Tables was that, if she were in manu mariti, she became their agnate in the nearest possible degree, and so came in in default of sui, Gaius iii. 24.

§ 2. It is usual to give A. D. 158 as the date of the SC. Tertullianum, there having been a consul Tertullus in that year, on the authority of Zonaras (12. 1) who says that it was enacted under A. Pius: but Justinian's statement that it was of Hadrian's reign is confirmed by a passage of Tryphoninus in Dig. 34. 5. 9. 1. An extension, clearly, of the lex Papia Poppaea, which conferred rights on women with a certain number of children (p. 265 supr., Tit. 7. 2 inf.), it gave to ingenuae who had borne three, and libertinae who had borne four children (§ 4 inf.), a statutory title to succeed their own issue who died intestate in preference to the agnates; by whom they were themselves excluded appears from the next section. Illegitimacy of the children was no bar to succession under this SC. or the SC. Orfitianum, § 6 inf.: Tit. 4. 3.

§ 3. The mother was excluded from the first by the children of a deceased son, if they ranked as liberi; if they were merely cognati (Tit. 1. 13 supr.) they and the mother came in together by bonorum possessio under a rescript of A. Pius, Dig. 38. 17. 2. 9. After the enactment of the

opponitur ex constitutionibus matri defunctae, id est aviae suae. pater quoque utriusque, non etiam avus vel proavus matri anteponitur, scilicet cum inter eos solos de hereditate agitur. frater autem consanguineus tam filii quam filiae excludebat matrem: soror autem consanguinea pariter cum matre admittebatur: sed si fuerat frater et soror consanguinei et mater liberis honorata, frater quidem matrem excludebat, communis autem erat hereditas ex aequis partibus fratri et
4 sorori. Sed nos constitutione, quam in codice nostro nomine decorato posuimus, matri subveniendum esse existimavimus, respicientes ad naturam et puerperium et periculum et saepe mortem ex hoc casu matribus illatam. ideoque impium esse credidimus casum fortuitum in eius admitti detrimentum: si enim ingenua ter vel libertina quater non peperit, immerito defraudabatur successione suorum liberorum: quid enim peccavit, si non plures, sed paucos pepererit? et dedimus ius legitimum plenum matribus sive ingenuis sive libertinis, etsi non ter enixae fuerint vel quater, sed eum tantum vel eam, qui quaeve morte intercepti sunt, ut et sic vocentur in libe-
5 rorum suorum legitimam successionem. Sed cum antea constitutiones iura legitima perscrutantes partim matrem adiuvabant, partim eam praegravabant et non in solidum eam vocabant, sed in quibusdam casibus tertiam partem ei

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SC. Orfitianum it was ruled by imperial constitutions, as is remarked in the text, that she must give way also to the children of a deceased daughter, Cod. 6. 57. 1. 4; 6. 55. 11. She was also postponed to the deceased child's natural father, whether he were entitled as parens manumissor or as bonorum possessor cum re, Ulpian, Reg. 26. 8.

The following changes were made in the mother's rights in the intermediate period before Justinian's own settlement of the law. Constantine enacted that a mother with ius liberorum should not only divide the succession with the soror consanguinea of the deceased, but should also lose a third of it in favour of his or her agnatic uncle (patruus) and his issue to the second degree, irrespective of capitis deminutio. He further conferred on mothers without the ius liberorum a right of succession to a third of a deceased child's property, the residue going to the nearest agnate or agnates; this third was doubled by Theodosius and Valentinian, who also gave a third to the deceased's emancipated brothers, whom previously the mother had altogether excluded.

§§ 4, 5. Justinian abolished the ius liberorum, along with the deductions made in favour of certain other relations which are noticed on § 3, and preferred the mother to all other legitimi, except that brothers and

abstrahentes certis legitimis dabant personis, in aliis autem contrarium faciebant: nobis visum est recta et simplici via matrem omnibus legitimis personis anteponi et sine ulla deminutione filiorum suorum successionem accipere, excepta fratris et sororis persona, sive consanguinei sint sive sola cognationis iura habentes, ut quemadmodum eam toto alio ordini legitimo praeposuimus, ita omnes fratres et sorores, sive legitimi sint sive non, ad capiendas hereditates simul vocemus, ita tamen ut, si quidem solae sorores cognatae vel adgnatae et mater defuncti vel defunctae supersint, dimidiam quidem mater, alteram vero dimidiam partem omnes sorores habeant, si vero matre superstite et fratre vel fratribus solis vel etiam cum sororibus sive legitima sive sola cognationis iura habentibus intestatus quis vel intestata moriatur, in capita distribuatur eius hereditas. Sed quemadmodum nos matribus 6
prospeximus, ita eas oportet suae suboli consulere: scituris eis, quod, si tutores liberis non petierint vel in locum remoti vel excusati intra annum petere neglexerint, ab eorum impuberum morientium successione merito repellentur. Licet autem vulgo quaesitus sit filius filiave, potest ad bona eius mater ex Tertulliano senatus consulto admitti.

IV

DE SENATUS CONSULTO ORFITIANO

Per contrarium autem ut liberi ad bona matrum intestatarum admittantur, senatus consulto Orfitiano effectum est, quod latum est Orfito et Rufo consulibus, divi Marci tem-

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sisters shared the inheritance with her; if there were brothers only, or brothers and sisters, it was divided in capita between them and the mother; if sisters only, they together and the mother took in moieties. By Nov. 22. 47 Justinian enacted that even where there were sisters only the division should be in capita.

§ **6.** This rule originated in an epistola of Septimius Severus, extant in Dig. 26. 6. 2. 2.

Tit. IV. Under the law of the Twelve Tables the children of a woman who died intestate had no claim to succeed her whatever; they were neither sui nor her agnates (unless indeed she was in manu mariti, in which case, unless a widow, she could leave no property to inherit). The praetor admitted them to bonorum possessio in the third (practically second) rank only, postponing them to their mother's agnates, Gaius iii.

poribus. et data est tam filio quam filiae legitima hereditas, etiamsi alieno iuri subiecti sunt: et praeferuntur et con-
1 sanguineis et adgnatis defunctae matris. Sed cum ex hoc senatus consulto nepotes ad aviae successionem legitimo iure non vocabantur, postea hoc constitutionibus principalibus emendatum est, ut ad similitudinem filiorum filiarumque et
2 nepotes et neptes vocentur. Sciendum autem est huiusmodi successiones, quae a Tertulliano et Orfitiano deferuntur, capitis deminutione non peremi propter illam regulam, qua novae hereditates legitimae capitis deminutione non pereunt, sed illae solae quae ex lege duodecim tabularum deferuntur.
3 Novissime sciendum est etiam illos liberos, qui vulgo quaesiti sunt, ad matris hereditatem ex hoc senatus consulto admitti.
4 Si ex pluribus legitimis heredibus quidam omiserint hereditatem vel morte vel alia causa impediti fuerint quominus

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30; the SC. Orfitianum, A. D. 178 ('Antonini et Commodi oratione' Ulpian, Reg. 26. 7, cf. Capitolinus Marc. 11), gave them a statutory title in preference to all agnates (Ulpian, loc. cit.), and the woman's patronus, if she were liberta, Dig. 38. 17. 1. 9.

§ **1.** The enactments referred to are those already cited and summarised on Tit. 1. 15 supr.

§ **2.** Justinian is here speaking of capitis deminutio minima only; the child's right to succeed was based on natural cognation, and in Bk. i. 16. 6 supr. he says 'quod autem dictum est manere cognationis ius et post capitis deminutionem, hoc ita est, si minima capitis deminutio interveniat', and in the Digest (38. 17. 1. 8) Ulpian, speaking of succession under this SC., says 'sive quis ante delatam capite minuitur, ad legitimam hereditatem admittetur, nisi magna capitis deminutio interveniat, quae vel civitatem adimit, ut puta, si deportetur'. The 'illa regula' is rather too widely stated, as there were some cases in which bonorum possessio unde liberi was lost by capitis deminutio, Dig. 38. 6. 9.

§ **3.** Cf. Tit. 3. 7 supr. and Cod. 6. 57. 5 (Justinian) 'sancimus . . . ut neque ex testamento, neque ab intestato, neque ex liberalitate inter vivos habita, iustis liberis existentibus, aliquid ab illustribus matribus ad spurios perveniat. Sin autem concubina liberae condicionis constituta filium vel filiam, ex licita consuetudine ab homine libero habita, procreaverit, eos etiam cum legitimis liberis ad materna venire bona . . . nulla dubitatio est'.

§ **4.** The law of accrual among joint heirs ab intestato differed according to the mode of division. If this was per capita, all the joint heirs who took benefited equally by the refusal or inability of those who did not; if it was per stirpes, the accrual enured primarily to the benefit only of those who belonged to the same stirps with them that had failed,

adeant: reliquis qui adierint adcrescit illorum portio et, licet ante decesserint qui adierint, ad heredes tamen eorum pertinet.

V

DE SUCCESSIONE COGNATORUM

Post suos heredes eosque, quos inter suos heredes praetor et constitutiones vocant, et post legitimos (quo numero sunt adgnati et hi, quos in locum adgnatorum tam supra dicta senatus consulta quam nostra erexit constitutio) proximos cognatos praetor vocat. Qua parte naturalis cognatio specta- 1
tur. nam **adgnati capite deminuti** quique ex his progeniti G. iii. 21.
sunt ex lege duodecim tabularum inter legitimos non ha-
bentur, sed a praetore **tertio** ordine vocantur, exceptis solis G. iii. 27.
tantummodo fratre et sorore emancipatis, non etiam liberis eorum, quos lex Anastasiana cum fratribus integri iuris constitutis vocat quidem ad legitimam fratris hereditatem sive sororis, non aequis tamen partibus, sed cum aliqua deminutione, quam facile est ex ipsius constitutionis verbis colligere, aliis vero adgnatis inferioris gradus, licet capitis deminutionem passi non sunt, tamen eos anteponit et procul dubio cognatis.

Dig. 37. 4. 12 pr., others gained only if there was no one left of that stirps to take.

Tit. V. Failing sui and agnates (p. 360 supr.), the Twelve Tables had given the inheritance to the gentiles of the deceased; 'si adgnatus nec escit, gentilis familiam nancitor.' In iii. 17 Gaius alludes to a definition of gentiles in an earlier part of his work, which, however, has been lost, and the best account we have of them is that of Cicero, Top. 6, cited by Mr. Poste in his note on the passage of Gaius referred to. Who they were precisely is of no practical importance, for Gaius observes that even in his day the whole of the law relating to the subject was obsolete, 'totum gentilicium ius in desuetudinem abiisse.' There was in fact no longer any civil law successor to an intestate in default of sui and agnates; the gap was filled by the praetor, who through the system of bonorum possessio substituted for the gentiles a third order of claimants, ranking after liberi and legitimi, viz. the deceased's cognates or next of kin, in their several degrees of proximity. Between two or more cognates related in the same degree the division was always in capita.

§ 1. For the lex Anastasiana see (3), note on Tit. 2. 4 supr. By capitis deminutio in this section is of course meant only capitis deminutio minima.

2 Hos etiam, **qui per feminini sexus personas** ex transverso
G. iii. 30 cognatione iunguntur, **tertio gradu** proximitatis nomine
3 praetor ad successionem vocat. **Liberi quoque, qui in adoptiva**
G. iii. 31. **familia sunt, ad naturalium parentum hereditatem hoc**
4 **eodem gradu vocantur.** Vulgo quaesitos nullum habere
adgnatum manifestum est, cum adgnatio a patre, cognatio
sit a matre, hi autem nullum patrem habere intelleguntur.
eadem ratione nec inter se quidem possunt videri consan-
guinei esse, quia consanguinitatis ius species est adgnationis:
tantum igitur cognati sunt sibi, sicut et matris cognatis.
itaque omnibus istis ea parte competit bonorum possessio,
5 qua proximitatis nomine cognati vocantur. Hoc loco et
illud necessario admonendi sumus adgnationis quidem iure admitti aliquem ad hereditatem et si decimo gradu sit, sive de lege duodecim tabularum quaeramus, sive de edicto quo praetor legitimis heredibus daturum se bonorum possessionem pollicetur. proximitatis vero nomine his solis praetor promittit bonorum possessionem, qui usque ad sextum gradum cognationis sunt, et ex septimo a sobrino sobrinaque nato nataeve.

VI

DE GRADIBUS COGNATIONIS

Hoc loco necessarium est exponere, quemadmodum gradus cognationis numerentur. qua in re inprimis admonendi sumus cognationem aliam supra numerari, aliam infra, aliam ex transverso, quae etiam a latere dicitur. superior cognatio est parentium, inferior liberorum, ex transverso fratrum sororumve eorumque, qui ex his progenerantur, et convenienter patrui amitae avunculi materterae. et superior quidem et inferior cognatio a primo gradu incipit: at ea, quae ex transverso numeratur, a secundo. Primo gradu est supra pater
2 mater, infra filius filia. Secundo supra avus avia, infra nepos

§ 2. The praetor had also admitted persons related directa linea through females among cognati; but by the SC[a] Tertullianum and Orfitianum and their developments these had been raised to the rank of legitimi, whence 'ex transverso' in the text.

§ 3. This refers of course only to adrogatio and adoptio plena; if it were minus plena the adoptatus succeeded to his natural father in the first order (liberi); see on Tit. 1. 14 supr.

neptis, ex transverso frater soror. Tertio supra proavus 3
proavia, infra pronepos proneptis, ex transverso fratris sororisque filius filia et convenienter patruus amita avunculus matertera. patruus est patris frater, qui Graece πάτρως vocatur: avunculus est matris frater, qui apud Graecos proprie μήτρως appellatur: et promiscue θεῖος dicitur. amita est patris soror, matertera vero matris soror: utraque θεία vel apud quosdam τηθίς appellatur. Quarto gradu supra 4
abavus abavia, infra abnepos abneptis, ex transverso fratris sororisque nepos neptis et convenienter patruus magnus amita magna (id est avi frater et soror), item avunculus magnus matertera magna (id est aviae frater et soror), consobrinus consobrina (id est qui quaeve ex fratribus aut sororibus progenerantur). sed quidam recte consobrinos eos proprie putant dici, qui ex duabus sororibus progenerantur, quasi consororinos: eos vero, qui ex duobus fratribus progenerantur, proprie fratres patrueles vocari (si autem ex duobus fratribus filiae nascantur, sorores patrueles appellantur): at eos, qui ex fratre et sorore propagantur, amitinos proprie dici (amitae tuae filii consobrinum te appellant, tu illos amitinos). Quinto supra atavus 5
atavia, infra adnepos adneptis, ex transverso fratris sororisque pronepos proneptis et convenienter propatruus proamita (id est proavi frater et soror), proavunculus promatertera (id est proaviae frater et soror), item fratris patruelis sororis patruelis, consobrini et consobrinae, amitini amitinae filius filia, proprior sobrinus sobrina (hi sunt patrui magni amitae magnae avunculi magni materterae magnae filius filia). Sexto gradu sunt supra 6
tritavus tritavia, infra trinepos trineptis, ex transverso fratris sororisque abnepos abneptis et convenienter abpatruus abamita (id est abavi frater et soror) abavunculus abmatertera (id est abaviae frater et soror), item sobrini sobrinaeque (id est qui quaeve ex fratribus vel sororibus patruelibus vel consobrinis vel amitinis progenerantur). Hactenus ostendisse 7
sufficiet, quemadmodum gradus cognationis numerentur. namque ex his palam est intellegere, quemadmodum ulterius quoque gradus numerare debemus: quippe semper generata quaeque persona gradum adiciat, ut longe facilius sit respondere, quoto quisque gradu sit, quam propria cognationis appellatione quemquam denotare. Adgnationis quoque 8

9 gradus eodem modo numerantur. Sed cum magis veritas oculata fide quam per aures animis hominum infigitur, ideo necessarium duximus post narrationem graduum etiam eos praesenti libro inscribi, quatenus possint et auribus et inspectione adulescentes perfectissimam graduum doctrinam adipisci. (*Locus in codice manuscripto vacuus qui genealogico stemmati fuerat destinatus.*)

10 Illud certum est ad serviles cognationes illam partem edicti, qua proximitatis nomine bonorum possessio promittitur, non pertinere: nam nec ulla antiqua lege talis cognatio computabatur. sed nostra constitutione, quam pro iure patronatus fecimus (quod ius usque ad nostra tempora satis obscurum atque nube plenum et undique confusum fuerat) et hoc humanitate suggerente concessimus, ut si quis in servili consortio constitutus liberum vel liberos habuerit sive ex libera sive servilis condicionis muliere, vel contra serva mulier ex libero vel servo habuerit liberos cuiuscumque sexus, et ad libertatem his pervenientibus et hi, qui ex servili ventre nati sunt, libertatem meruerunt, vel dum mulieres liberae erant, ipsi in servitutem eos habuerunt et postea ad libertatem pervenerunt, ut hi omnes ad successionem vel patris vel matris veniant, patronatus iure in hac parte sopito: hos enim liberos non solum in suorum parentium successionem, sed etiam alterum in alterius mutuam successionem vocavimus, ex illa lege specialiter eos vocantes, sive soli inveniantur qui in servitute nati et postea manumissi sunt, sive una cum aliis, qui post libertatem parentium concepti sunt sive ex eadem matre vel eodem patre sive ex aliis nuptiis, ad similitudinem eorum qui ex iustis nuptiis procreati sunt.

Tit. VI. 9. For a genealogical table exhibiting the degrees of cognation see Hunter's Roman Law, 1st ed., p. 651.

§ **10.** Cf. Dig. 38. 8. 1. 2 'nec enim facile ulla servilis videtur esse cognatio'; so too, in Dig. 38. 10. 10. 5 it is said that, though loosely one may speak of slaves as being kin to one another, 'ad leges serviles cognationes non pertinent.' On the other hand, Ulpian says (Dig. 50. 17. 32) 'quod attinet ad ius civile, servi pro nullis habentur: non tamen et iure naturali; quia, quod ad ius naturale attinet, omnes homines aequales sunt.' This no doubt is due to his distinction between the ius gentium and the ius naturale; see on Bk. i. 1. 4, ib. 2 pr. supr. Justinian's own enactments referred to in this section are in Cod. 6. 57. 6; 6. 4. 4.

Repetitis itaque omnibus quae iam tradidimus apparet non 11
semper eos, qui parem gradum cognationis optinent, pariter vocari eoque amplius nec eum quidem, qui proximior sit cognatus, semper potiorem esse. cum enim prima causa sit suorum heredum quosque inter suos heredes iam enumeravimus, apparet pronepotem vel adnepotem defuncti potiorem esse quam fratrem aut patrem matremque defuncti, cum alioquin pater quidem et mater, ut supra quoque tradidimus, primum gradum cognationis optineant, frater vero secundum, pronepos autem tertio gradu sit cognatus et abnepos quarto: nec interest, in potestate morientis fuerit an non fuerit, quod vel emancipatus vel ex emancipato aut ex feminino sexu
propagatus est. Amotis quoque suis heredibus quosque inter 12
suos heredes vocari diximus, adgnatus, qui integrum ius adgnationis habet, etiamsi longissimo gradu sit, plerumque potior habetur quam proximior cognatus: nam patrui nepos vel pronepos avunculo vel materterae praefertur. totiens igitur dicimus aut potiorem haberi eum qui proximiorem gradum cognationis optinet, aut pariter vocari eos qui cognati sint, quotiens neque suorum heredum iure quique inter suos heredes sunt neque adgnationis iure aliquis praeferri debeat secundum ea quae tradidimus, exceptis fratre et sorore emancipatis, qui ad successionem fratrum vel sororum vocantur, qui et si capite deminuti sunt, tamen praeferuntur ceteris ulterioris gradus adgnatis.

VII

DE SUCCESSIONE LIBERTORUM

Nunc de libertorum bonis videamus. olim itaque licebat G. iii. 39. 40.
liberto patronum suum impune testamento praeterire: nam ita demum lex duodecim tabularum ad hereditatem liberti vocabat patronum, si intestatus mortuus esset libertus nullo suo herede relicto. itaque intestato quoque mortuo liberto, si is suum heredem reliquisset, nihil in bonis eius patrono ius erat. et si quidem ex naturalibus liberis aliquem suum heredem reliquisset, nulla videbatur querella: si vero adoptivus filius esset, aperte iniquum erat nihil iuris patrono superesse.
Qua de causa postea praetoris edicto haec iuris iniquitas 1 G.iii.41.

emendata est. sive enim faciebat testamentum libertus, iubebatur ita testari, ut patrono partem dimidiam bonorum suorum relinqueret: et si aut nihil aut minus partis dimidiae reliquerat, dabatur patrono contra tabulas testamenti partis dimidiae bonorum possessio. si vero intestatus moriebatur suo herede relicto filio adoptivo, dabatur aeque patrono contra hunc suum heredem partis dimidiae bonorum possessio. prodesse autem liberto solebant ad excludendum patronum naturales liberi, non solum quos in potestate mortis tempore habebat, sed etiam emancipati et in adoptionem dati, si modo ex aliqua parte heredes scripti erant aut praeteriti contra tabulas bonorum possessionem ex edicto petierant: nam exheredati
G.iii.42. 2 nullo modo repellebant patronum. Postea lege Papia adaucta sunt iura patronorum, qui locupletiores libertos habebant. cautum est enim, ut ex bonis eius, qui sestertiorum centum millium patrimonium reliquerit et pauciores quam tres liberos habebat, sive is testamento facto sive intestato mortuus erat, virilis pars patrono debebatur. itaque cum unum filium filiamve heredem reliquerit libertus, perinde pars dimidia patrono debebatur, ac si is sine ullo filio filiave decessisset: cum duos duasve heredes reliquerat, tertia pars debebatur
3 patrono: si tres reliquerat, repellebatur patronus. Sed nostra constitutio, quam pro omnium notione Graeca lingua compendioso tractatu habito composuimus, ita huiusmodi causas definivit, ut si quidem libertus vel liberta minores centenariis sint, id est minus centum aureis habeant substantiam (sic enim legis Papiae summam interpretati sumus, ut pro mille sestertiis unus aureus computetur), nullum locum habeat patronus

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Tit. VII. 2. For the effect of the lex Papia Poppaea on the rights of patronae and filiae patroni see Mr. Poste's note on Gaius iii. 54.

§ 3. The constitution referred to, which is in Cod. 6. 4. 4, abolished all previous distinctions of sex between libertus and liberta, patron and patroness or their children, and regulated the succession to freedmen and freedwomen as follows:

(1) As regards the power of testation, a libertus or liberta who possessed less than 100 aurei might freely dispose of it by will, without any obligation to give the patron or patroness anything either as heir or legatee. If the property amounted to 100 aurei or upwards they might make what will they pleased only if they instituted their issue; if there was no issue, or

in eorum successionem, si tamen testamentum fecerint. sin autem intestati decesserint nullo liberorum relicto, tunc patronatus ius, quod erat ex lege duodecim tabularum, integrum reservavit. cum vero maiores centenariis sint, si heredes vel bonorum possessores liberos habeant sive unum sive plures cuiuscumque sexus vel gradus, ad eos successionem parentum deduximus, omnibus patronis una cum sua progenie semotis. sin autem sine liberis decesserint, si quidem intestati, ad omnem hereditatem patronos patronasque vocavimus: si vero testamentum quidem fecerint, patronos autem vel patronas praeterierint, cum nullos liberos haberent vel habentes eos exheredaverint, vel mater sive avus maternus eos praeterierit, ita ut non possint argui inofficiosa eorum testamenta: tunc ex nostra constitutione per bonorum possessionem contra tabulas non dimidiam, ut ante, sed tertiam partem bonorum liberti consequantur, vel quod deest eis ex constitutione nostra repleatur, si quando minus tertia parte bonorum suorum libertus vel liberta eis reliquerint, ita sine onere, ut nec liberis liberti libertaeve ex ea parte legata vel fideicommissa praestentur, sed ad coheredes hoc onus redundaret: multis aliis casibus a nobis in praefata constitutione congregatis, quos necessarios esse ad huiusmodi iuris dispositionem perspeximus: ut tam patroni patronaeque quam liberi eorum nec non qui ex transverso latere veniunt usque ad quintum gradum ad successionem libertorum vocentur, sicut ex ea constitutione intellegendum est: ut si eiusdem patroni vel patronae vel duorum duarum pluriumve sint liberi, qui proximior est, ad liberti seu libertae vocetur successionem et in capita, non in stirpes dividatur successio, eodem modo et in his qui ex transverso latere veniunt servando. paene enim consonantia iura ingenuitatis et libertinitatis in succes-

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if it were disinherited, and they did not institute the patron or patroness in a third, clear of legacies and fideicommissa, the latter could demand possession of it contra tabulas.

(2) A libertus or liberta who died intestate was succeeded, in the first instance, by his or her natural descendants of either sex, irrespective of capitis deminutio, and whether they were born in slavery or not, so long as they were free at the parent's decease, Tit. 6. 10 supr.; in default of these, by the patron or patroness; thirdly, by the latter's children according

Cf. G. iii. 55-76. 4 sionibus fecimus. Sed haec de his libertinis hodie dicenda sunt, qui in civitatem Romanam pervenerunt, cum nec sunt alii liberti simul et dediticiis et Latinis sublatis, cum Latinorum legitimae successiones nullae penitus erant, qui licet ut liberi vitam suam peragebant, attamen ipso ultimo spiritu simul animam atque libertatem amittebant, et quasi servorum ita bona eorum iure quodammodo peculii ex lege Iunia manumissores detinebant. postea vero senatus consulto Largiano cautum fuerat, ut liberi manumissoris non nominatim exheredati facti extraneis heredibus eorum in bonis Latinorum praeponerentur. quibus supervenit etiam divi Traiani edictum, quod eundem hominem, si invito vel ignorante patrono ad civitatem venire ex beneficio principis festinavit, faciebat vivum quidem civem Romanum, Latinum autem morientem. sed nostra constitutione propter huiusmodi condicionum vices et alias difficultates cum ipsis Latinis etiam legem Iuniam et senatus consultum Largianum et edictum divi Traiani in perpetuum deleri censuimus, ut omnes liberti civitate Romana fruantur, et mirabili modo quibusdam adiectionibus ipsas vias, quae in Latinitatem ducebant, ad civitatem Romanam capiendam transposuimus.

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to proximity, without regard to capitis deminutio; and lastly by the patron's or patroness' collaterals to the fifth degree.

§ 4. A patron who succeeded to the estate of his libertus civis took it quasi hereditario iure, practically as his nearest agnate; but he took that of his Latinus Iunianus, whom the lex Iunia Norbana had disabled from making a will, p. 254 supra, simply as his master, 'iure quodammodo peculii' Gaius iii. 56; it was regarded as so much potential property of the manumitter, bequeathable by him, along with the rest of his fortune, to whomsoever he pleased. The fact that a civis libertus died free, and was succeeded on intestacy by a relation or quasi-relation, while a Latinus died a slave, and was, properly speaking, not succeeded at all, accounts for the differences which existed in Gaius' time (iii. 57–62) between the devolutions of their respective properties. Thus, the right of succeeding to a libertus civis invariably descended to the patron's children; that of taking the property of a Latinus belonged to the patron's heres (Gaius iii. 58): a libertus civis was succeeded by joint patrons in equal shares, though before his manumission they might have owned him in unequal proportions: 'bona vero Latinorum pro ea parte pertinent pro qua parte quisque eorum dominus fuit' (Gaius ib. 59). One patron of a civis excluded another patron's son, and so on, but the property of a Latinus went to one patron and another patron's heir in the ratio in which it would

VIII

DE ADSIGNATIONE LIBERTORUM

In summa quod ad bona libertorum admonendi sumus senatum censuisse, ut quamvis ad omnes patroni liberos, qui eiusdem gradus sint, aequaliter bona libertorum pertineant, tamen liceret parenti uni ex liberis adsignare libertum, ut post mortem eius solus is patronus habeatur, cui adsignatus est, et ceteri liberi, qui ipsi quoque ad eadem bona nulla adsignatione interveniente pariter admitterentur, nihil iuris in his bonis habeant. sed ita demum pristinum ius recipiunt, si is cui adsignatus est decesserit nullis liberis relictis. Nec tantum 1
libertum, sed etiam libertam, et non tantum filio nepotive, sed etiam filiae neptive adsignare permittitur. Datur autem 2
haec adsignandi facultas ei, qui duos pluresve liberos in potestate habebit, ut eis, quos in potestate habet, adsignare et libertum libertamve liceat. unde quaerebatur, si eum cui

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have belonged to the two patrons (Gaius iii. 60); between joint patrons of a civis there was accrual 'bona autem Latini pro parte decedentis patroni caduca fiunt et ad populum pertinent' (ib. 62). The SC. Largianum, A. D. 42, enacted that where the patron of a Latinus instituted an extraneus heres, the right of taking his property upon his decease should belong to the patron's children so far as they were not expressly disinherited, Gaius ib. 67–71. For the attainment of civitas by a Latinus ex beneficio principis, to which the edict of Trajan related, cf. Gaius iii. 72, Ulpian, Reg. 3. 2, and Mr. Poste's notes on Gaius i. 28–35.

The fate of the property of a deceased dediticius libertus had depended upon the mode of his manumission. If it had been such as would have made him a civis, were it not for the 'vitium' owing to which he necessarily became dediticius (p. 117 supra), the property devolved as though he actually were a civis libertus: if, except for the disqualification, it would have made him a Latinus, it devolved as though he actually were a Latinus, Gaius iii. 74–76.

Tit. VIII. This right of assignment modified the rule, that when a patron died his rights of succeeding to his liberti cives passed to all his children who were not capite minuti in equal proportions, by enabling him to give to any one or more of those in his power a preference over the rest in relation to all or any of his freedmen: 'adsignare libertum hoc est testificari, cuius ex liberis libertum esse voluit' Dig. 50. 16. 107. It became a question among the jurists whether such an assignment might be made to an emancipated child, and in Dig. 38. 4. 9 Modestinus says the better opinion was in the affirmative, except where he had only

adsignaverit postea emancipaverit, num evanescat adsignatio? sed placuit evanescere, quod et Iuliano et aliis plerisque visum
3 est. Nec interest, testamento quis adsignet an sine testamento: sed etiam quibuscumque verbis hoc patronis permittitur facere ex ipso senatus consulto, quod Claudianis temporibus factum est Suillo Rufo et Ostorio Scapula consulibus.

IX

DE BONORUM POSSESSIONIBUS

Ius bonorum possessionis introductum est a praetore emendandi veteris iuris gratia. nec solum in intestatorum hereditatibus vetus ius eo modo praetor emendavit, sicut supra dictum est, sed in eorum quoque, qui testamento facto decesserint. nam si alienus postumus heres fuerit institutus, quamvis hereditatem iure civili adire non poterat, cum institutio non valebat, honorario tamen iure bonorum possessor efficiebatur, videlicet cum a praetore adiuvabatur: sed et hic a nostra constitutione hodie recte heres instituitur, quasi
G.iii.34. **1** et iure civili non incognitus. **Aliquando tamen neque emendandi neque impugnandi veteris iuris, sed magis confirmandi gratia pollicetur bonorum possessionem. nam illis quoque, qui recte facto testamento heredes instituti sunt, dat secundum tabulas bonorum possessionem: item ab intestato suos heredes et adgnatos ad bonorum possessionem vocat:** sed et **remota quoque bonorum possessione ad eos hereditas pertinet**
G.iii.32. **2 iure civili. Quos autem praetor** solus **vocat ad hereditatem, heredes quidem ipso iure non fiunt (nam praetor heredem facere non potest: per legem enim tantum vel similem iuris**

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one in his power: but under Justinian the law seems to have been otherwise: ἐμαγκιπάτῳ γὰρ ἀδσιγνατεύειν οὐ δυνατόν Theoph. So limited, the practice shows clearly that if the patron or his children succeeded the libertus at all, they did so as his nearest agnates: if they or he were capite minuti, the agnatic tie was broken, and the right of succession lost: hence the rule that a freedman could not give himself in adrogation, Dig. 1. 7. 15. 3.

Tit. IX. For the institution of postumi alieni see on Bk. ii. 20. 28 supr.

§ **1**. For bonorum possessio secundum tabulas see on Bk. ii. 17. 6 supr.: for the succession of sui, Tit. 1 supr.: of agnates, Tit. 2.

constitutionem heredes fiunt, veluti per senatus consultum et constitutiones principales) : sed cum eis praetor dat bonorum possessionem, loco heredum constituuntur et vocantur bonorum possessores. **adhuc autem et alios complures gradus praetor** G. iii. 33.
fecit **in bonorum possessionibus dandis, dum id** agebat, **ne quis sine successore moriatur :** nam angustissimis finibus constitutum per legem duodecim tabularum ius percipiendarum hereditatum praetor ex bono et aequo dilatavit. Sunt autem **3**
bonorum possessiones ex testamento quidem hae. prima, quae praeteritis liberis datur vocaturque contra tabulas. secunda, quam omnibus iure scriptis heredibus praetor pollicetur ideoque vocatur secundum tabulas. et cum de testamentis prius locutus est, ad intestatos transitum fecit. et primo loco suis heredibus et his, qui ex edicto praetoris suis connumerantur, dat bonorum possessionem quae vocatur unde liberi : secundo legitimis heredibus : tertio decem personis, quas extraneo manumissori praeferebat (sunt autem decem personae hae : pater mater, avus avia tam paterni quam

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§ 3. The principal cases of bonorum possessio contra tabulas have been already pointed out on Bk. ii. 13. 7 supr. Possession of goods was awarded on intestacy to eight different classes of persons, in the following order of priority, each being known by a technical name derived from its place in the edict :

(1) Liberi : see on Tit. 1. 9 supr.

(2) Legitimi : see on Tit. 2. 4 supr. In succession to freedmen, this class consisted originally only of the patron, his children who had not been capite minuti, and the patroness : how it was modified by the SC[a] Tertullianum and Orfitianum has been noticed on Tits. 3 and 4 supr.

(3) Decem personae : this class relates only to succession to an emancipatus ; under the old law, when the final act of manumission was performed by the extraneous vendee (p. 145 supra) the latter was postponed by the praetor to all the deceased's cognates in the ascending and descending lines within the second degree.

(4) The cognates according to proximity, Tit. 5 supr.

(5) Tum quam ex familia : the patron or patroness's nearest collateral agnates.

(6) Patronus, patrona, liberi et parentes eorum : i.e. the patron's or patroness's own patron or patroness, and his or her cognates in the direct line.

(7) Vir et uxor : the surviving consort of the deceased, who by the civil law had no right of succession whatever.

(8) The collateral cognates of the patron within the sixth degree, Tit. 5. 5 supr. In the extremely improbable event of there being no one

materni, item filius filia, nepos neptis tam ex filio quam ex filia, frater soror sive consanguinei sive uterini): quarto

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belonging to even the lowest of these classes to take bonorum possessio, the estate escheated to the aerarium (later to the fiscus): 'si nemo sit, ad quem bonorum possessio pertinere possit, aut sit quidem sed ius suum omiserit, populo bona deferuntur ex lege Iulia caducaria' Ulpian, Reg. 28. 7.

It will be observed that, besides class 3, which related to what cannot ever have been a very common case, classes 5, 6, and 8 did not come into consideration unless the intestate were a freedman or a freedwoman. Class 3 became meaningless under Justinian's new system of emancipation, and the other three he altogether abolished. Thus in his legislation intestate bonorum possessores were arranged in four classes only, their order being—liberi, legitimi, cognati, vir et uxor; but he also retained an anomalous group (§ 8 inf.), called sometimes for the sake of brevity 'tum quibus ex legibus', comprising those persons to whom the statute law had enacted that bonorum possessio (as distinct from the hereditas) should be given: e.g. the patron in concurrence with the children of a libertus under the lex Papia Poppaea, Tit. 7. 1 and 2 supr.: 'quippe cum non alias huic competit bonorum possessio, quam si lex specialiter deferat bonorum possessionem' Dig. 38. 14. 1. 2.

For a discussion of the probable origin of bonorum possessio, and of its development into an organized scheme of succession, see Excursus IV, at the end of this Book. A little more is necessary in order to thoroughly understand its nature.

In order to obtain possession of property belonging to the deceased, the bonorum possessor had, as such, a special procedure, the interdict Quorum bonorum (Dig. 43. 2, Gaius iv. 144), which had certain advantages over the remedy available to the heres, *qua* heres (viz. hereditatis petitio, by which he established his title to the universitas iuris). Thus, the interdict was never excluded by usucapio lucrativa (p. 231 supr.: cf. Gaius ii. 52–58), and availed also against persons 'qui dolo desierant possidere': hereditatis petitio was not thus privileged until the time of Hadrian, Dig. 5. 3. 20. 6–21, ib. 25 pr.–17. It is then no matter for surprise that heirs, who had an unimpeachable civil title, applied for bonorum possessio secundum tabulas in order to be able to use the interdict, § 1 supr., Gaius iii. 34; and similarly, as the heir could claim to become bonorum possessor, so the praetor treated the bonorum possessor as heir (§ 2 supr.: cf. note on Bk. ii. 10. 2 supr.): i.e. he allowed him to sue and be sued under a fiction by the actions, which lay at the suit of and against the heres: Ulpian, Reg. 28. 12: cf. Gaius iv. 34 '. . . . is qui ex edicto bonorum possessionem petiit, ficto se herede agit'. After the establishment of the Empire, and before Hadrian, he was, like the heres, enabled to sue for the universitas by a 'possessoria hereditatis petitio' Dig. 5. 5. For another view of the relation between the interdict and hereditatis petitio see on Bk. iv. 15. 3 inf.

A noticeable point of difference between bonorum possessio and here-

cognatis proximis: quinto tum quam ex familia: sexto patrono et patronae liberisque eorum et parentibus: septimo

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ditas is that the former was never acquired ipso iure, as the latter was by necessarii or sui et necessarii heredes. It was obtained originally by application to the praetor (agnitio or petitio bonorum possessionis) which could be made by an agent, while no one could accept an inheritance except the person to whom it was delata, note on Bk. ii. 19. 7 supr. This application was usually granted without precise inquiry into the applicant's title, which, if investigated at all, was investigated later, and only because it was disputed by some one who alleged that his own right was a better one. In this case the latter would be granted a second and formal bonorum possessio 'litis ordinandae gratia'. The sons of Constantine enacted that bonorum possessio might be obtained from any judge or magistrate by a mere signification of acceptance, Cod. 6. 9. 8 and 9, though this was still called agnitio or petitio; and this is the rule referred to by Justinian in § 12 inf. as holding in his day.

The right to take the possession could be lost by either express repudiation (§ 10 inf.) or lapse of the time (specified in § 9; Ulpian, Reg. 28. 10; cf. note on Bk. ii. 19. 5 supr.) within which it was required by law to be exercised. A person barred by such lapse was excluded only from one rank or class: if he was admitted by the edict in a lower rank also, he had another opportunity ('sibi ipse succedere' Dig. 38. 9. 1. 10 and 11). Occasionally, however, the praetor would not grant bonorum possessio without an examination into the circumstances of the particular case. For instance, the edictum Carbonianum provided, that if the parentage of an impubes, upon which his rights of succession depended, was disputed, the magistrate should hold a summary inquiry, and if in this his alleged parentage was not clearly disproved, bonorum possessio should be granted provisionally to him upon security being given against waste, until the question at issue was definitely settled, such settlement often being postponed until the child attained puberty. In cases of this sort, if bonorum possessio was eventually granted after the magisterial examination, it was called bonorum possessio decretalis in contrast with that which was given under the general provisions of the edict (edictalis).

Even supposing the bonorum possessor had an indefeasible title as such, the praetor did not necessarily guarantee him the succession against a possible heres, who might have remained satisfied with his civil law title. E.g. a suus is praeteritus in the father's will, by which the latter is avoided, so that he becomes heres ab intestato; the institutus in the will obtains bonorum possessio secundum tabulas: or upon an intestacy the cognates obtain bonorum possessio, while there is a suus or agnate as heres. Under such circumstances as these, if the claim of the praetorian successor is overriden by that of the heres, the bonorum possessio is said to be sine re, or ineffectual: 'bonorum possessio aut cum re datur, aut sine re: cum re, si is qui accepit cum effectu bona retineat: sine re, cum alius iure civili evincere hereditatem possit' Ulpian, Reg. 28. 13: cf. Gaius iii. 35–38. The rule upon this matter may be thus stated:

4 viro et uxori: octavo cognatis manumissoris. Sed eas quidem praetoria induxit iurisdictio. nobis tamen nihil incuriosum praetermissum est, sed nostris constitutionibus omnia corrigentes contra tabulas quidem et secundum tabulas bonorum possessiones admisimus utpote necessarias constitutas, nec non ab intestato unde liberi et unde legitimi bonor-
5 um possessiones. Quae autem in praetoris edicto quinto loco posita fuerat, id est unde decem personae, eam pio proposito et compendioso sermone supervacuam ostendimus: cum enim praefata bonorum possessio decem personas praeponebat extraneo manumissori, nostra constitutio, quam de emancipatione liberorum fecimus, omnibus parentibus eisdemque manumissoribus contracta fiducia manumissionem facere dedit, ut ipsa manumissio eorum hoc in se habeat privilegium et supervacua fiat praedicta bonorum possessio. sublata igitur praefata quinta bonorum possessione in gradum eius sextam antea bonorum possessionem reduximus et quintam fecimus,
6 quam praetor proximis cognatis pollicetur. Cumque antea septimo loco fuerat bonorum possessio tum quam ex familia et octavo unde liberi patroni patronaeque et parentes eorum, utramque per constitutionem nostram, quam de iure patronatus fecimus, penitus vacuavimus: cum enim ad similitudinem successionis ingenuorum libertinorum successiones posuimus, quas usque ad quintum tantummodo gradum coartavimus, ut sit aliqua inter ingenuos et libertos differentia, sufficiunt eis tam contra tabulas bonorum possessio quam unde legitimi et unde cognati, ex quibus possint sua iura vindicare, omni scrupulositate et inextricabili errore duarum istarum bonorum
7 possessionum resoluta. Aliam vero bonorum possessionem, quae unde vir et uxor appellatur et nono loco inter veteres bonorum possessiones posita fuerat, et in suo vigore servavimus et altiore loco, id est sexto, eam posuimus, decima veteri bonorum possessione quae erat unde cognati manumissoris

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where there is a collision between the civil and the praetorian title, the latter must yield to the former, and be sine re, except in cases of bonorum possessio iuris civilis impugnandi gratia, viz. where the possession is given to liberi upon intestacy, and to emancipated children contra tabulas, and in certain instances of bonorum possessio secundum tabulas, for which see on Bk. ii. 17. 6. supr.

propter causas enarratas merito sublata: ut sex tantummodo bonorum possessiones ordinariae permaneant suo vigore pollentes. Septima eas secuta, quam optima ratione praetores 8
introduxerunt. novissime enim promittitur edicto his etiam bonorum possessio, quibus ut detur lege vel senatus consulto vel constitutione comprehensum est, quam neque bonorum possessionibus quae ab intestato veniunt neque eis quae ex testamento sunt praetor stabili iure connumeravit, sed quasi ultimum et extraordinarium auxilium, prout res exigit, accommodavit scilicet his, qui ex legibus senatus consultis constitutionibus principum ex novo iure vel ex testamento vel ab intestato veniunt. Cum igitur plures species succes- 9
sionum praetor introduxisset easque per ordinem disposuisset et in unaquaque specie successionis saepe plures extent dispari gradu personae: ne actiones creditorum differantur, sed haberent quos convenirent, et ne facile in possessionem bonorum defuncti mittantur et eo modo sibi consulerent, ideo petendae bonorum possessioni certum tempus praefinivit. liberis itaque et parentibus tam naturalibus quam adoptivis in petenda bonorum possessione anni spatium, ceteris centum dierum dedit. Et si intra hoc tempus aliquis bonorum pos- 10
sessionem non petierit, eiusdem gradus personis adcrescit: vel si nemo sit, deinceps ceteris proinde bonorum possessionem ex successorio edicto pollicetur, ac si is qui praecedebat ex eo numero non esset. si quis itaque delatam sibi bonorum possessionem repudiaverit, non quousque tempus bonorum possessioni praefinitum excesserit exspectatur, sed statim ceteri ex eodem edicto admittuntur. In petenda autem 11

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§ 11. The distinction between tempus utile and continuum has been already explained on Bk. ii. 19. 5 supr. The idea of the former originated in the necessity of performing some act within a prescribed time, by the non-performance of which a right might be lost, and which might be interfered with either (1) by the courts being closed; (2) by the absence of some person whose presence was essential, Dig. 44. 3. 1; (3) by some disability of the person by whom the act had to be performed, e.g. absence, illness, or excusable ignorance of his right. As a rule, time was reckoned as continuum; it is usually utile when the interval for performance is not more than a year and is prescribed by law, and where the act itself is a judicial one.

Before finally leaving the subject of intestate succession it is necessary

12 bonorum possessione dies utiles singuli considerantur. Sed bene anteriores principes et huic causae providerunt, ne quis pro petenda bonorum possessione curet, sed, quocumque modo

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to notice briefly the important revolution which Justinian effected in its rules by Nov. 118, A.D. 543. By this he repealed all existing law on the subject: 'prioribus legibus pro hac causa positis cessantibus, de cetero ea sola servari quae nunc constituimus.' The new system was based solely on cognation, between which and agnation it disowned any distinction, save so far as was involved in the recognition of adoptive relationship: it also treated males and females on precisely the same footing. Intestate successors were arranged in four classes, in the following order of priority:

(1) Descendants, division between these being in stirpes: 'tantam de hereditate morientis accipientes partem, quanticunque sint, quantam eorum parens, si viveret, habuisset, quam successionem in stirpes vocavit antiquitas' Nov. 118. 1: thus a descendant related to the deceased through both parents received a double portion. The descendant did not, however, in every case inherit the usufruct along with the proprietas; e.g. if the deceased was in potestas, note on Tit. 1. 15 supr.; or if the deceased was a woman, the surviving husband was entitled to the usufruct of a part, Cod. 6. 60. 3.

(2) Ascendants and brothers and sisters of the whole blood succeed together. A nearer was preferred to a more remote ascendant: if there were two or more ascendants in the same degree, they divided the succession per capita if they belonged to the same line, paternal or maternal: if to different lines, each took half. If there are no ascendants, sons and daughters of brothers and sisters of the whole blood deceased came in with those still surviving, of course per stirpes: after Nov. 127 these persons take the share of the deceased parent even when there are surviving ascendants.

(3) Brothers and sisters of the half blood, and descendants in the first degree of such brothers and sisters deceased.

(4) All other cognates, according to proximity, whether related by the whole or half blood: 'si vero neque fratres neque filios fratrum, sicut diximus, defunctus reliquerit, omnes a latere cognatos ad hereditatem vocamus, secundum uniuscuiusque gradus praerogativam, ut viciniores gradu reliquis praeponantur. Si autem plurimi eiusdem gradus inveniantur, secundum personarum numerum inter eos hereditas dividatur, quod in capita nostrae leges appellant' Nov. 118. 3. 1.

These rules have been summarised in the following memorial lines:

Descendens omnis succedit in ordine primo:
Ascendens propior, germanus, filius eius:
Tunc latere ex uno frater, quoque filius eius:
Hi cuncti in stirpes succedunt, in capita autem
Iuncti ascendentes, fratrum proles quoque sola.
Denique proximior reliquorum quisque superstes.

§ **12**. Failing even cognates, the praetorian rule of vir et uxor was

si admittentis eam indicium, intra statuta tamen tempora, ostenderit, plenum habeat earum beneficium.

X

DE ADQUISITIONE PER ADROGATIONEM

Est et **alterius generis** per universitatem **successio, quae** G. iii. 82.
neque lege duodecim tabularum neque praetoris edicto, sed eo iure, quod consensu receptum est, introducta est. Ecce 1 G. iii. 83.
enim cum pater familias sese in adrogationem dat, **omnes res eius corporales et incorporales quaeque ei debitae sunt** adrogatori ante quidem pleno iure adquirebantur, **exceptis his quae per capitis deminutionem pereunt quales sunt operarum obligationes** et ius adgnationis. usus etenim et **usus fructus,** licet his antea connumerabantur, attamen capitis deminutione minima eos tolli nostra prohibuit constitutio. Nunc autem 2

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followed. Under certain circumstances indeed a widow had a claim against the estate of her deceased husband, even when the latter left a will, or died intestate having other successors: i.e. when she was poor, and had no dos, she was entitled to a fourth of her husband's property, or, if there were more than three legitimate children born of the marriage, to a virilis portio, Nov. 117. 5.

Tit. X. So too in Dig. 1. 6. 8 pr. patria potestas is said to be moribus recepta, and in iii. 82 Gaius ascribes the universal succession resulting from conventio in manum to the ius quod consensu receptum est.

§ 1. For the extinction of usus and ususfructus by capitis deminutio minima see p. 220 supr. By operarum obligationes are meant operae liberti secured by stipulation or iurata promissio, Gaius iii. 83: operae servorum sive animalium were not extinguished in this manner, note on Bk. ii. 5. 5 supr.: cf. Dig. 4. 5. 10; 7. 7. 2; 7. 8. 10 pr.

§ 2. Over castrensia and quasi castrensia bona of adrogatus the adrogator had no rights whatever: the rest of his property, not being derived ex re patris [adoptivi], would constitute peculium adventitium, so that the usufruct of it would belong to the adrogator. For the 'aliae personae' see on Tit. 1. 15 supr. (succession to filiusfamilias having peculium).

§ 3. Though under the ius civile neither adrogator nor adrogatus could be sued for debts incurred by the latter before his capitis deminutio, the debts remained as obligationes naturales, Dig. 4. 5. 2. 2, and the praetor granted actiones utiles against adrogatus himself (Gaius iii. 84) under the fiction that he was still sui iuris: 'rescissa capitis deminutione, id est [actio] in qua fingitur capite deminutus non esse' Gaius iv. 38. This was a genuine in integrum restitutio of the creditors: 'integri restitutionem praetor tribuit ex his causis quae per . . . status permutationem gesta esse dicuntur' Paul. Sent. Rec. 1. 7. 2. Obligations arising from delict were

nos eandem adquisitionem, quae per adrogationem fiebat, coartavimus ad similitudinem naturalium parentum: nihil etenim aliud nisi tantummodo usus fructus tam naturalibus patribus quam adoptivis per filios familias adquiritur in his rebus quae extrinsecus filiis obveniunt, dominio eis integro servato: mortuo autem filio adrogato in adoptiva familia etiam dominium eius ad adrogatorem transit, nisi supersint aliae personae, quae ex nostra constitutione patrem in his

G.iii.84. 3 quae adquiri non possunt antecedunt. Sed **ex diverso** pro eo, **quod is debuit qui se in adoptionem dedit,** ipso quidem iure adrogator non **tenetur,** sed nomine filii convenietur et, si noluerit eum defendere, permittitur creditoribus per competentes nostros magistratus bona, quae eorum cum usu fructu futura fuissent, si se alieno iuri non subiecissent, possidere et legitimo modo ea disponere.

XI

DE EO CUI LIBERTATIS CAUSA BONA ADDICUNTUR

Accessit novus casus successionis ex constitutione divi Marci. nam si hi, qui libertatem acceperunt a domino in testamento, ex quo non aditur hereditas, velint bona sibi addici libertatium conservandarum causa, audiuntur. et ita

1 rescripto divi Marci ad Popilium Rufum continetur. Verba rescripti ita se habent: 'Si Virginio Valenti, qui testamento

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never extinguished by capitis deminutio minima ('nemo delictis exuitur, quamvis capite minutus sit' Dig. 4. 5. 2. 3), neither was the obligation arising ex deposito if the depositee remained in possession after the capitis deminutio, Dig. 16. 3. 21, nor debts owed by an inheritance accepted by adrogatus before adrogation, Gaius iii. 84. Under Justinian, after having been in integrum restituti against the civil extinction of their claims (Dig. 4. 5. 2. 1), the creditors sued the adrogator as adrogatus' representative; but the restitutio in this particular case was abnormal, being claimable as a matter of right, 'sine causa cognita' Dig. loc. cit., and not being subject to the ordinary rules of limitation: 'hoc iudicium perpetuum est' Dig. 4. 5. 2. 5.

Tit. XI. 1. The estate would be adjudged to the creditors, in order to be sold in satisfaction of their claims, only after being rejected by the instituti, all the intestate heirs, and the fiscus. The rescript of M. Aurelius seems to have contemplated only addictio to one of the slaves manumitted

suo libertatem quibusdam adscripsit, nemine successore ab
intestato existente in ea causa bona esse coeperunt, ut veniri
debeant: is cuius de ea re notio est aditus rationem desiderii
tui habebit, ut libertatium tam earum, quae directo, quam
earum, quae per speciem fideicommissi relictae sunt, tuen-
darum gratia addicantur tibi, si idonee creditoribus caveris
de solido quod cuique debetur solvendo. et hi quidem,
quibus directa libertas data est, perinde liberi erunt, ac si
hereditas adita esset: hi autem, quos heres rogatus est manu-
mittere, a te libertatem consequantur: ita ut si non alia
condicione velis bona tibi addici, quam ut etiam qui directo
libertatem acceperunt tui liberti fiant, nam huic etiam volun-
tati tuae, si ii de quorum statu agitur consentiant, aucto-
ritatem nostram accommodamus. et ne huius rescriptionis
nostrae emolumentum alia ratione irritum fiat, si fiscus bona
agnoscere voluerit: et hi qui rebus nostris attendunt scient
commodo pecuniario praeferendam libertatis causam et ita
bona cogenda, ut libertas his salva sit, qui eam adipisci
potuerunt, si hereditas ex testamento adita esset.' Hoc 2
rescripto subventum est et libertatibus et defunctis, ne bona
eorum a creditoribus possideantur et veneant. certe si fuerint
ex hac causa bona addicta, cessat bonorum venditio: extitit
enim defuncti defensor, et quidem idoneus, qui de solido
creditoribus cavet. Inprimis hoc rescriptum totiens locum 3
habet, quotiens testamento libertates datae sunt. quid ergo
si quis intestatus decedens codicillis libertates dederit neque
adita sit ab intestato hereditas? favor constitutionis debet
locum habere. certe si testatus decedat et codicillis dederit
libertatem, competere eam nemini dubium est. Tunc con- 4
stitutioni locum esse verba ostendunt, cum nemo successor
ab intestato existat: ergo quamdiu incertum sit, utrum
existat an non, cessabit constitutio: si certum esse coeperit
neminem extare, tunc erit constitutioni locus. Si is, qui 5
in integrum restitui potest, abstinuit se ab hereditate, an,

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by the will (Popilius Rufus being εἷς τῶν τυχόντων ἐλευθερίας ἐν τῇ διαθήκῃ Theophilus); Gordian permitted it to be made to any one who would give the security 'de solido quod cuique debetur solvendo' Cod. 7. 2. 6.

§ 5. For in integrum restitutio see on Bk. iv. 6. 33 inf. The causa for the restitutio here is minor aetas.

quamvis potest in integrum restitui, potest admitti constitutio et addictio bonorum fieri? quid ergo, si post addictionem libertatum conservandarum causa factam in integrum sit restitutus? utique non erit dicendum revocari libertates,
6 quae semel competierunt. Haec constitutio libertatum tuendarum causa introducta est: ergo si libertates nullae sint datae, cessat constitutio. quid ergo, si vivus dedit libertates vel mortis causa et, ne de hoc quaeratur, utrum in fraudem creditorum an non factum sit, idcirco velint addici sibi bona, an audiendi sunt? et magis est, ut audiri debeant, etsi
7 deficiant verba constitutionis. Sed cum multas divisiones eiusmodi constitutioni deesse perspeximus, lata est a nobis plenissima constitutio, in quam multae species collatae sunt, quibus ius huiusmodi successionis plenissimum est effectum: quas ex ipsa lectione constitutionis potest quis cognoscere.

XII

DE SUCCESSIONIBUS SUBLATIS, QUAE FIEBANT PER BONORUM VENDITIONEM ET EX SENATUS CONSULTO CLAUDIANO

Erant ante praedictam successionem olim et aliae per
Cf. G. iii. 77–81. universitatem successiones. qualis fuerat bonorum emptio, quae de bonis debitoris vendendis per multas ambages fuerat

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§ **7.** Justinian's own constitution is in Cod. 7. 2. 15. 1–6.

Tit. XII. For the system of bankruptcy execution in use under the iudicia ordinaria see Excursus X at the end of this volume, and Mr. Poste's note on Gaius iii. 77. He adopts Savigny's theory that there were, from the first, two different modes of proceeding against insolvent debtors: the one—manus iniectio or personal execution—applying only where the judgment or confession on which execution issued was on a money loan, real (mutuum) or fictitious (nexum) or on certain other obligations assimilated by statute to mutuum, Gaius iv. 22; the other, or execution against the property, being resorted to in all other cases. A commoner view is that, until about 100 B.C., manus iniectio (though its severities were mitigated by the lex Poetelia, Livy viii. 28) was the only remedy open to a creditor if his debtor refused or was unable to satisfy a judgment debt; about which time a new form of execution against the property, or real execution, was introduced by the Edict, of which a leading feature was sale of the bankrupt's universitas iuris by auction to the bidder who offered the creditors the highest percentage on their claims, this prae-

introducta et tunc locum habebat, quando iudicia ordinaria in usu fuerunt: sed cum extraordinariis iudiciis posteritas usa est, ideo cum ipsis ordinariis iudiciis etiam bonorum venditiones exspiraverunt et tantummodo creditoribus datur officio

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torian form of bankruptcy execution being called bonorum emptio or venditio, and being described by Gaius (iii. 77–81) as one of the kinds of universal succession.

Though it is difficult to come to any definite conclusion on so obscure a topic, the latter view seems best supported by the facts, apart from its inherent probability on grounds of historical jurisprudence. Savigny has to prove two positions: first, that personal execution was confined to the classes of debts specified; and second, that a system of real execution was in vogue at Rome from the earliest times.

In support of the former he calls attention to what seems an undeniable fact, viz. that the Romans always drew a broad distinction between debts incurred by money loans and all other debts, and cites various authors (e. g. Gellius 20. 1, quoting the Twelve Tables, and Livy vi. 14. viii. 28, xxiii. 14) to show that manus iniectio is almost invariably associated with debts of the first kind. On the other hand, we have the explicit statement of Gaius (iv. 21) that it was the proper procedure on every judgment debt, however incurred. Savigny, however, relies most on chaps. 21 and 22 of the lex Rubria or lex Galliae Cisalpinae, in which it is provided that when an action is brought for pecunia certa credita, manus iniectio shall be employed: when on any other liability, another procedure may be resorted to—'eos duci, bona eorum possideri iubeto'. On his interpretation, this means that, for pecunia certa credita, the execution must be personal, while in other cases it must be real; but it is far more natural to suppose that, except for money loans, the statute gave the magistrate the option of either applying the harsher procedure, or putting the creditor in possession of the debtor's property.

In the second place, if a system of real execution had existed at Rome from the time of the Twelve Tables onwards, and with the width of operation which Savigny assigns to it, the rules by which it was regulated must have formed no inconsiderable body of law, which (one might reasonably suppose) would have been mentioned by general writers, and even been described at length by those who specially concerned themselves with legal topics. This, however, is not the case. It can hardly be denied that in isolated cases the praetor allowed a debtor's estate to be seized and sold, and Savigny cites an instance of this even before the lex Poetelia (Livy ii. 24); but we have the express statement again of Gaius (iv. 35) that the systematic employment of such a procedure was believed to date from the praetorship of Publius Rutilius, doubtless the well-known statesman and jurist who was consul 105 B.C.: 'quae species actionis . . . a praetore Publio Rutilio, qui et bonorum venditionem introduxisse dicitur, comparata est.' If bonorum venditio, as a system of execution in bankruptcy standing in contrast with manus iniectio, had existed from the

iudicis bona possidere et prout eis utile visum fuerit ea disponere, quod ex latioribus digestorum libris perfectius

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beginning of Roman legal history, we may surely presume that the fact would have been known to Gaius.

In the text before us Justinian connects the disappearance of bonorum venditio with the abolition of the iudicia ordinaria. It seems more probable that both its disappearance, and the procedure in use under Justinian himself, were in some way due to or connected with a senatus-consult passed under one of the earlier emperors, and mentioned in Dig. 27. 10. 5 and 9, by which it was provided that where the bankrupt was of senatorial rank, and the creditors assented, instead of the estate being sold *en bloc* (bonorum venditio), a curator bonorum should be appointed by the magistrate for the purpose of disposing of the assets piecemeal and in lots, and paying the creditors pro rata out of the proceeds. The ordinary execution in bankruptcy of Justinian's time (bonorum distractio, Bk. ii. 19. 1 supr.) was very similar in character. The creditors, or some of them, applied to the magistrate for missio in bona : from the granting of this application an interval was allowed for others to come in and prove their claims by action, those who resided in the same province having two, others four years for this purpose. As soon as it had elapsed, those who had not yet proved their claims were excluded from all benefit in the proceedings, and could demand satisfaction out of the bona possessa only if a balance remained after paying the rest in full, Cod. 7. 72. 10, unless they were hypothecary creditors, in which case, if they preferred it, they could rely exclusively on their security, and take no part in the liquidation at all. During the two or four years the estate, though technically possessed by the creditors who had been missi in possessionem, was administered by a curator, whom other creditors made their defendant (and not the bankrupt himself) in the actions which they brought for the establishment of their claims, and by whom the assets were sold in lots ; the proceeds of the sale were distributed by the judge among the creditors, in a determinate order of priority. Property which the insolvent might subsequently acquire remained liable to successive sales, until the creditors had been paid in full.

Embarrassed debtors could also usually avail themselves of a procedure more in the nature of a voluntary composition with creditors, called cessio bonorum (Bk. iii. 25. 8 ; iv. 6. 40 ; ib. 14. 4 inf.), which was introduced by a lex Iulia of one of the two first Caesars. By adopting this course they escaped liability to arrest and imprisonment, Cod. 7. 71. 1, which bankrupts proper might still incur if the missio in bona produced no results ; a debtor could be committed to prison at the outset only on the application of the Treasury. Further, they did not become infames, like bankrupts, Cod. 2. 12. 11 ; 7. 71. 8 pr., and were allowed to retain so much of their after-acquired property as was necessary for their subsistence (beneficium competentiae, see on Bk. iv. 6. 37 inf.), Dig. 42. 3. 4, Cod. 7. 71. 1. No debtor, however, could claim to make a cessio bonorum whose

apparebit. Erat et ex senatus consulto Claudiano miserabilis 1
per universitatem adquisitio, cum libera mulier servili amore bacchata ipsam libertatem per senatus consultum amittebat et cum libertate substantiam: quod indignum nostris temporibus esse existimantes et a nostra civitate deleri et non inseri nostris digestis concessimus.

XIII

DE OBLIGATIONIBUS

Nunc transeamus ad obligationes. obligatio est iuris vinculum, quo necessitate adstringimur alicuius solvendae rei secundum nostrae civitatis iura. G. iii. 88.
Omnium autem obligationum **summa divisio in duo** genera **diducitur**: namque aut civiles sunt aut praetoriae. civiles sunt, quae aut legibus constitutae aut certe iure civili comprobatae sunt. praetoriae sunt, quas praetor ex sua iurisdictione constituit, quae etiam honorariae vocantur. 1
Sequens divisio in quattuor species diducitur: aut enim **ex contractu** sunt aut quasi ex contractu 2

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insolvency was due to his own fault. The procedure after the surrender seems in all essential points to have been the same as in bankruptcy.

§ 1. For the SC. Claudianum see Bk. i. 3. 4 supr.

A mode of universal succession described by Gaius (iii. 85–87), but not alluded to by Justinian, as being obsolete in his day, is in iure cessio of an hereditas by an agnate entitled on intestacy, for which see p. 266 supr. It seems improper to regard this as a universal succession, for what the agnate transferred was, not the hereditas, but the single right of becoming heres to a succession as yet only delata.

Tit. XIII. For the general nature of obligations, their chief divisions, and modes of transfer, see Excursus V at the end of this Book.

§ 1. The divisions of obligations into civiles and praetoriae or honorariae obviously does not correspond with that explained in Excursus V inf. into civil and natural: it has reference, as appears from the text, to the legislative organ by which it was declared that such or such an act or event should engender a (civil) obligation. In this sense civiles obligationes are those which were made actionable by the organs of the civil law—by a lex, plebiscitum, senatusconsult, imperial constitution, or by the action of the jurists: obligationes praetoriae are those which owed their actionability to the edict: 'quas praetor ex sua iurisdictione constituit' seems to mean 'quas, occasione a iuris dicundi munere sumpta, decretis primum, deinde edicto perpetuo constituit.'

§ 2. The sources of obligations are thus enumerated by Modestinus in Dig. 44. 7. 52 pr.: res—verba—consensus (the three forms of contractual

G. iii. 89. aut ex **maleficio** aut quasi ex maleficio. **prius est, ut de his quae ex contractu sunt dispiciamus. harum** aeque **quattuor**

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liability)—lex—ius honorarium—necessitas—peccatum. Lex and necessitas he explains as follows: 'lege obligamur, cum obtemperantes legibus aliquid secundum praeceptum legis aut contra facimus: . . . . . necessitate obligantur quibus non licet aliud facere, quam quod praeceptum est: quod evenit in necessario herede.' The fourfold division of Justinian, though more complete than that given by Gaius in his Institutes (iii. 88), is in effect derived from the same writer's liber tertius aureorum (Dig. 44. 7. 5), from which Justinian literally takes his instances of obligations arising quasi ex contractu and quasi ex delicto, and in which (§§ 1 and 5) these terms occur, though a few lines above they are comprised under the perplexing expression 'variarum causarum figurae'. The meaning of these four sources of obligations will appear sufficiently from the text relating to them respectively: but they do not comprehend all the obligations of Roman law, and therefore the classification must be condemned as in the first place inexhaustive. Contracts (sensu Romano) are those agreements which were actionable under even the old civil law: but in course of time a considerable number of other agreements were made actionable by the influence of the jurists, the edict, and imperial enactment: in none of these, which the commentators call pacta vestita, to distinguish them from pacta nuda, was the obligation said to arise ex contractu, and in fact they have no place whatever in Justinian's arrangement. No system of law probably can dispense with the notion of obligation quasi ex contractu, for there must always be circumstances in which one person is placed under an obligation to another without any promise, express or implied, made by him to the latter, and which yet so closely resemble those of contract as to make this their most reasonable denomination: but the fault of Justinian is that nothing which he says about this source of obligation suggests any general criterion by which one can precisely draw the line between it and contract proper, or which accounts for the existence of an obligation in the particular instances by which he illustrates the conception. But the idea of obligation quasi ex delicto, which is open to the same objection, is further to be condemned as really unnecessary, as will appear from the cases by which it is exemplified (Bk. iv. 5 inf.), most of which are instances of vicarious responsibility analogous to the liability in tort of a railway company or other employer for the wrong-doing or negligence of its servants. Its existence is to be accounted for purely on historical grounds (see Hunter's Roman Law, p. xxxvi), and it is to be regretted that Justinian tolerated its survival. The actual sources of obligation in Roman law may more logically be arranged as follows: (1) Agreement, comprising the four classes of contracts, the so-called innominate contracts, and pacta vestita. (2) Circumstances analogous to contract, including tutela, cura, negotiorum gestio, joint inheritance, joint ownership not arising ex contractu, litis contestatio, and perhaps the unjust enrichment of one man at the cost of another (cf. Tit. 14. 1 with Tit. 27. 6 inf.). (3) A person's mere 'unilateral' expression of will (exemplified by some cases of pollici-

species sunt: **aut enim re contrahuntur aut verbis aut litteris aut consensu.** de quibus singulis dispiciamus.

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tatio, e.g. Dig. 50.12. 1. 1, ib. 2, though as a general rule 'ex nuda pollicitatione nulla actio nascitur' Paul. Sent. Rec. 5. 12. 9), or that of another by whose decease one has taken a benefit (exemplified by legacy and fideicommissum). (4) Judgment or magisterial order. (5) Delict. For an enumeration of the sources of obligation in English law see Sir W. R. Anson's Law of Contract (Introductory chapter).

The idea of agreement (conventio or pactio) underlies that of contractus: 'et est pactio duorum pluriumve in idem placitum et consensus' Dig. 2. 14. 1. 2. Its analysis into the elements of offer or proposal and acceptance is the work rather of general jurisprudence than of a particular system, which has been done once for all by Savigny, Oblig. § 52, System iii. §§ 140, 141: cf. Pollock's Principles of Contract, chap. i. Pactio then is the genus of which contractus is the species: the differentia lies in the circumstance that to certain pacta or pactiones a civilis obligatio was annexed by the older Roman civil law in virtue either of their nature, or of their being attended by some other fact besides the mere fact of agreement. That, through which a pactum is also a contract, is usually called its causa civilis, and of such causae civiles there are four, viz. (1) res, acceptance of ownership, possession or detention of an object by one party from the other, with an express or implied undertaking to do something in return, whence the four Real Contracts. (2) The expression of the agreement in a certain verbal form (obligatio verborum), that of question and answer (stipulatio) being regarded as the verbal contract *par excellence.* (3) The employment of writing in a manner peculiarly characteristic of the Romans, whence the obligatio litterarum; and (4) in transactions of four specific kinds the mere agreement (consensus) of the parties: whence the consensual contracts of sale, hire, partnership, and agency. How other pacts besides these were gradually made actionable, though not dignified by the Romans with the name of contract (which is less a legal than a historical term) will appear as we proceed.

It is difficult to say why Gaius (whom Justinian follows) discussed the four classes of contracts in the order—Real, Verbal, Literal, and Consensual. Mr. Poste supposes that it was perhaps the order of their chronological development, here following Savigny, who holds that mutuum was the earliest contract which the Roman law enforced by action: for an acute criticism of this hypothesis, and of Ortolan's and Sir Henry Maine's theory that there was a time when the Roman law possessed but one common form for contract and conveyance (the negotium per aes et libram), see Hunter's Roman Law, pp. 352–379, where the whole question of the origin and development of the Roman contract system is well and fully discussed.

The real and consensual contracts were said to be iuris gentium: and to suppose that one of these (mutuum), at any rate in the form in which we know it, was actionable at Rome before the formal civil law contracts

XIV

QUIBUS MODIS RE CONTRAHITUR OBLIGATIO

G. iii 90. **Re contrahitur obligatio veluti mutui datione. mutui autem** obligatio **in his rebus** consistit, **quae pondere numero mensurave constant, veluti vino oleo frumento pecunia numerata aere argento auro, quas res aut numerando aut metiendo aut pendendo in hoc damus, ut accipientium fiant et quandoque nobis non eaedem** res, **sed aliae eiusdem naturae et** qualitatis **reddantur. unde etiam mutuum appellatum sit, quia ita a me tibi datur,** ut **ex meo tuum fiat.** ex eo contractu nascitur

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of nexum and stipulatio seems entirely opposed to the general conclusions of historical law. On the other hand it must be admitted that mutuum seems to stand clearly apart from the three other real contracts: the remedy on it was condictio, a stricti iuris iudicium, while they were all pursued by bonae fidei actions; and in mutuum the borrower is made owner of the thing borrowed; the lender 'dat', i.e. parts with his own dominium: whereas in the other three nothing is ever transferred beyond possession, so that the transferor can always in case of breach recover his own by real action. These are conjectured by Dr. Hunter to have been derived from fiducia (the nature of which has been already described, p. 326 supr.), and the action on which was bonae fidei, Gaius iv. 62: the difficulty of ascribing the same origin to mutuum lies in the difference of the remedy.

Tit. XIV. The obligation in a real contract is generated by delivery, whether what passes is dominium, as in mutuum, possession, as in pignus, or detention, as in commodatum and depositum. The bare agreement to deliver was by itself not binding: else the contract would have been not real, but consensual.

A mutuum (loan for consumption, as contrasted with commodatum, loan for use) exists only if the property passes in what is lent: 'si non fiat tuum, non nascitur obligatio' Dig. 12. 1. 2. 2, so that as a general rule no one can lend in this form unless he is owner, Dig. ib. 2. 4, and has the capacity of alienation, Bk. ii. 8. 2 supr.: cf. Dig. 26. 8. 9 pr. The chief duty of the borrower is specified in the text, viz. to give back as much and as good as was lent him: not the same thing, for only those objects can be thus lent which the commentators call res fungibiles, and the Romans quantitas; or, as it is otherwise expressed, they have to be returned not in specie, but in genere. Unless a date for repayment was agreed upon either expressly or by implication, it could be demanded at any time. If interest was part of the bargain, it could not be sued for under the mutuum itself, owing to the nature of the remedy: the agreement to pay it must be entered into by stipulation, so that it, and the promise to repay the principal, were distinct contracts: though there is reason to believe that owing to this rule about interest the promise to repay the principal sum as well

actio quae vocatur condictio. **Is quoque, qui non debitum** 1 G.iii.91.
accepit ab eo qui per errorem solvit, re obligatur : daturque agenti contra eum propter repetitionem condicticia actio. **nam proinde ei condici potest ' si paret eum dare oportere ' ac si mutuum accepisset :** unde pupillus, si **ei sine tutoris auctoritate non debitum per errorem datum est,** non tenetur indebiti **condictione non magis quam mutui datione. sed haec species obligationis non videtur ex contractu consistere, cum is qui solvendi animo dat magis distrahere voluit nego-**

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was often embodied in a stipulation : cf. iv. 13. 2 inf. The action on a loan of money was called condictio certi, that on any other mutuum condictio triticaria : see the references in the General Index. For the bearing of the SC. Macedonianum on the law of money loans see Bk. iv. 7. 7 and notes inf.

§ 1. In Tit. 27. 6 inf. (derived from Gaius in Dig. 44. 7. 5. 3) the person to whom money not really due is paid by mistake is said to be bound to return it quasi ex contractu. In Gaius' time (iii. 91) it had been a moot point whether a pupillus to whom such a payment had been made without his guardian's auctoritas was liable to condictio indebiti ; perhaps this was part of the larger question whether a pupillus was bound even naturaliter by his unauthorized contracts, Dig. 26. 8. 5 pr. and 1. Gaius himself was in favour of the affirmative opinion, which on principle seems right, for (as Mr. Poste says) condictio was not founded on contract, but on the fact that a defendant had been without cause enriched at the expense of the plaintiff.

Condictio indebiti lay only under the following conditions :

(1) What is paid must not really be owed by the one party to the other, even naturaliter : ' si quod dominus servo debuit manumisso solvit, quamvis existimans ei aliqua teneri actione, tamen repetere non poterit, quia naturale agnovit debitum ' Dig. 12. 6. 64, ' indebitum est non tantum, quod omnino non debetur, sed et quod alii debetur, si alii solvatur, aut si id, quod alius debebat, alius, quasi ipse debeat, solvat ' Dig. ib. 65, 9. The payment need not be a payment of money, so that the condictio may be certae pecuniae, triticaria, or incerti. If the defendant in an action in which ' lis crescit in duplum ' (Tit. 27. 7 inf.) admitted his liability and paid the single damages, and subsequently was able to show that in fact he had not been liable, he could not recover the money as indebitum (loc. cit., Gaius ii. 283), on the ground that his voluntary payment was in effect a compromise, and so by implication a contract. On this principle money paid under a supposed but non-existent judgment was irrecoverable, Dig. 10. 2. 36 : conversely, if, though there is an actual debt, the debtor pays something different from what he really owes, he can recover, Dig. 12. 6. 32. 3.

(2) The payment must be made in error ; ' et quidem si indebitum ignorans solvit, per hanc actionem condicere potest : sed si sciens se non

2 **tium quam contrahere.** Item is cui res aliqua utenda datur, id est commodatur, re obligatur et tenetur commodati actione. sed is ab eo qui mutuum accepit longe distat: namque non ita res datur, ut eius fiat, et ob id de ea re ipsa restituenda tenetur. et is quidem qui mutuum accepit, si quolibet fortuito casu quod accepit amiserit, veluti incendio ruina naufragio aut latronum hostiumve incursu, nihilo minus obligatus permanet. at is qui utendum accepit sane quidem exactam diligentiam custodiendae rei praestare iubetur nec sufficit ei tantam diligentiam adhibuisse, quantam suis rebus adhibere solitus est, si modo alius diligentior poterit eam rem custodire: sed propter maiorem vim maioresve casus non tenetur, si modo non huius culpa is casus intervenerit: alioquin si id quod tibi commodatum est peregre ferre tecum malueris et vel incursu hostium praedonumve vel naufragio amiseris,

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debere solvit, cessat repetitio' Dig. 12. 6. 1. 1: and this in some cases even if the mistake was one of law, Dig. 36. 4. 1 pr.: Girard, p. 617, note 3.

(3) The payment must be accepted by the payee in good faith; i. e. he must believe the debt to be due: else he commits theft, and should be sued by condictio furtiva, which excludes the condictio indebiti: Dig. 47. 2. 43 pr.; 13. 1. 18.

The defendant in condictio indebiti, if judgment went against him, was not bound to restore the whole of what had been paid him, but only so far as he was enriched by the payment at the time of litis contestatio: 'bonae fidei possessor in quantum locupletior factus est tenetur' Dig. 12. 6. 3; ib. 26. 12; ib. 32 pr. A peculiar variety of mutuum is foenus nauticum, when the owner of a vessel borrows money for the purpose of a voyage: he is not bound to repay it unless the vessel reaches port, and the lender was not limited in the amount of interest he might demand until Justinian fixed it at 12 per cent.: the payment of such interest could be secured by a simple pact.

§ 2. The duties of the borrower in a commodatum besides that of reasonable care (diligentia, for which see Excursus VI at the end of this Book) were (1) to restore the object lent at the time agreed upon, or so soon as the purpose for which it was lent was satisfied: it could be redemanded earlier only upon breach of another general term of the contract, viz. (2) to use it only for the purpose for which it was lent: to use it for others was theft, if the borrower was aware that the other would not have permitted it, Bk. iv. 1. 6–8 inf., (3) to return it in as good condition as when received, excepting such deterioration as naturally results from its use, or as might reasonably have been expected: 'si reddita quidem sit res commodata, sed deterior reddita, non videtur reddita, quae deterior facta redditur, nisi quod interest praestetur: proprie enim dicitur res non reddita quae deterior redditur' Dig. 13. 6. 3. 1: for the exceptions see

dubium non est, quin de restituenda ea re tenearis. commodata autem res tunc proprie intellegitur, si nulla mercede accepta vel constituta res tibi utenda data est. alioquin mercede interveniente locatus tibi usus rei videtur: gratuitum enim debet esse commodatum. Praeterea et is, apud quem 3
res aliqua deponitur, re obligatur et actione depositi, qui et ipse de ea re quam accepit restituenda tenetur. sed is ex eo

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ib. 23, and 5. 7, cited in Hunter's Roman Law, p. 302, (4) to restore not only it, but also any gain which he may have made by using it in a manner not authorized by the contract, Dig. ib. 13. 1.

Like depositum, pignus, and mandatum, commodatum is said to generate an obligation only imperfectly bilateral: i. e. as a general rule, only one of the parties (the borrower) is bound, and only one (the lender) is entitled. But very often a liability of the latter will arise from circumstances posterior to the contract itself: thus, in commodatum, though (4) supr. implies that all ordinary expenses in connection with the object lent must be borne by the borrower, the lender will be bound to indemnify him for any extraordinary costs necessarily incurred: e. g. 'quidquid in rem commodatam ob morbum vel aliam rationem impensum est a domino recipi potest' Paul. Sent. Rec. 2. 4. 1: or for any injury caused by it to the borrower or his property, if this can be attributed to the fault of the lender: e. g. Dig. 13. 6. 22. These duties can be enforced against the lender either by retentio (lien) or by actio commodati (contraria).

§ 3. Like commodatum, depositum was a gratuitous contract: in the absence of special agreement, the depositary's duties were as follow: (1) it is commonly said that he is answerable only for dolus (and culpa lata): see the text above; Dig. 13. 6. 5. 2: 16. 3. 1. 8: but he is answerable also for culpa levis in concreto even where it does not amount to culpa lata: 'nisi tamen ad suum modum curam in deposito praestat, fraude non caret: nec enim salva fide minorem his quam suis rebus diligentiam praestabit' Dig. 16. 3. 32, hence he was not as a rule answerable if the property was stolen, though as a rule it was presumed that allowing theft argued absence of diligentia exacta, Dig. 17. 2. 52. 3: (2) to return it in as good condition as when delivered to him, unless its deterioration is due to causes not within the ken of that degree of diligence which he is bound to show, Dig. 16. 3. 1. 16: (3) to restore it (and any fruits it may have borne while in his custody, Dig. 22. 1. 38. 10) on demand: even if a time was agreed upon for its return, he must give it up before if required, Dig. 16. 3. 1. 22. The obligation to return a depositum was absolute: so that even if the depositary alleged that it belonged to him, he must first give it up, and then might claim the dominium by real action, Cod. 4. 34. 11. Lastly, (4) he might not use the depositum: such use without the depositor's consent amounted to theft, Bk. iv. 1. 6 inf., unless made bona fide, in which case he must give up all profit which had accrued to

solo tenetur, si quid dolo commiserit, culpae autem nomine, id est desidiae atque neglegentiae, non tenetur: itaque securus est qui parum diligenter custoditam rem furto amisit, quia, qui neglegenti amico rem custodiendam tradit, suae facilitati

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him thereby, Cod. 4. 34. 4. Condemnation in the actio depositi directa entailed infamia on the depositary: see iv. 16. 2 inf.

The same duties might be incurred ex post facto by the depositor as by the commodator, but he was required to show a higher degree of diligentia, the contract being in his interest alone: the depositarius, however, could enforce them only by actio depositi (contraria), not by retentio or lien, Cod. 4. 34. 11. A peculiarity of the actio depositi directa was that in it no compensatio or set off by the defendant was allowed, Bk. iv. 6. 30 inf.

If the deposit was occasioned by pressing and irresistible necessity, e. g. by tumultus, incendium, ruina, or naufragium—the liability of the depositarius was doubled in respect of damages: this is usually called depositum miserabile: 'de eo, quod tumultus, incendii, ruinae, naufragii causa depositum est, in heredem de dolo mortui actio est pro hereditaria portione et in simplum et intra annum quoque: in ipsum et in solidum et in duplum et in perpetuum datur' Dig. 16. 3. 18: cf. Bk. iv. 6. 17 and 23 inf. The liability had always been in duplum when the deposit was made by fiducia: in other words, a denial of the trust was treated as a furtum nec manifestum. When the praetor made a violation of the duties incurred by mere acceptance of detention actionable, he reduced the damages by one half: 'ex causa depositi lege duodecim tabularum in duplum actio datur, edicto praetoris in simplum' Paul. Sent. Rec. 2. 12. 11.

Two varieties of the contract are sequestration and the so-called depositum irregulare. The first is the deposit of property by two or more persons in order to withdraw it from the disposition of both or all, especially where the title to it is in dispute: here the depositarius, or, as he was specifically called, sequester, might by special arrangement have civil possession (p. 334 supr.) in order to prevent acquisition of the object per usucapionem by any of the claimants, Dig. 16. 3. 6. Depositum irregulare exists where a res fungibilis is deposited with the agreement that the depositary shall become its owner, and only be bound to return a similar quantity and quality. The thing is at his risk; i. e. if it is accidentally destroyed, lost, or stolen, he alone suffers; but he has the right to use it. The transaction differs from mutuum, which it so closely resembles, in the intention of the parties: a mutuum is given in the interest of the borrower, or, if payment of interest be stipulated for, in that of both parties: a deposit of this kind is made in the interest of the depositor only: and the difference was material, for by the actio depositi, which was bonae fidei, interest was recoverable, whether due by agreement or on account of mora. The commonest illustration of the contract is to be found in banking; if money were deposited unsecured by key, seal, or other fastening, it was presumed to be a depositum irregulare:

id imputare debet. Creditor quoque qui pignus accepit re 4
obligatur, qui et ipse de ea ipsa re quam accepit restituenda tenetur actione pigneraticia. sed quia pignus utriusque gratia datur, et debitoris, quo magis ei pecunia crederetur, et credi-

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'. . . . idem iuris esse in deposito: nam si quis pecuniam numeratam ita deposuisset, ut neque clausam neque obsignatam traderet, sed adnumeraret, nihil aliud eum debere, apud quem deposita esset, nisi tantundem pecuniae solvere' Dig. 19. 2. 31.

§ 4. As a source of rights in rem, pignus has been already discussed, p. 328 sq. supr. Justinian's requirement of exacta diligentia in the pledgee, though irreconcileable with Gaius in Dig. 13. 6. 18 pr. (where only that qualem in suis rebus etc. is exacted), is confirmed by Ulpian and Paulus in Dig. 13. 7. 13. 1; ib. 14. Some difficulty is occasioned by the word 'sufficere'; possibly the jurist (perhaps Gaius) from whom the text was derived, after describing commodatum, and saying that the borrower was answerable for exacta diligentia, went on 'in pledge, on the other hand, it is sufficient that the pledgee should be as careful as in suis rebus'; and the compilers of the Institutes, while altering the degree of diligentia to agree with Ulpian and Paulus, omitted to alter sufficere into some such word as requiri (Schrader).

The chief other duties of the pledgee were (1) to return the property pledged when the debt was paid, or the ius pignoris otherwise determined. The general rule too is that he must either give up to the pledgor all the fruits or other profit derived from the property, or deduct their value from the amount of the debt, Dig. 13. 7. 22 pr.: but on this point there was often some special agreement, e. g. antichresis. (2) If he exercised the right of sale, he was bound to hand over to the pledgor only what remained after discharging the principal debt with interest, unless by his own fault he sold it for less than its real value: in which case he was liable to pay the difference himself.

The possible duties to which the pledgor might become liable ex post facto correspond to those which have been noticed under commodatum: he was also bound (1) to indemnify the pledgee against all liabilities which he might incur in his efforts to sell the property at the highest possible price, Dig. 13. 7. 22. 4; (2) to deliver it up when required for sale, if it had been left in his hands on hire or as precarium; (3) to compensate his creditor for any loss he might have suffered through his pledging to him a res aliena, and so constituting in his favour an unreal ius pignoris, Dig. 13. 7. 1. 2.

The principle of the real contracts is part performance: their causa civilis was the fact that one of the parties had done all that he had primarily undertaken, or rather that the other had in a sense accepted performance from him. Shortly after the fall of the Republic, and perhaps, as has been supposed, through the influence of the jurist Labeo (Dig. 19. 5. 1. 1; ib. 19 pr.; ib. 20 pr.), the Roman contract system received a considerable extension by a more general recognition of this

toris, quo magis ei in tuto sit creditum, placuit sufficere, quod ad eam rem custodiendam exactam diligentiam adhiberet: quam si praestiterit et aliquo fortuito casu rem amiserit, securum esse nec impediri creditum petere.

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principle. Every agreement, even though not belonging to any of the three hitherto established classes of contract, in which an act on the one side was the consideration for an act on the other, was at length, though only by a gradual development which was not fully completed according to Girard (4th ed. p. 507) until Justinian, held enforceable by action at the suit of that party who had performed all to which he was bound under its terms: 'sed et si in alium contractum res non transeat, subsit tamen causa, eleganter Aristo Celso respondit, esse obligationem, ut puta dedi tibi rem, ut mihi aliam dares, dedi, ut aliquid facias, hoc *συνάλλαγμα* esse, et hinc nasci civilem obligationem' Dig. 2. 14. 7. 2. The essential marks of such actionable agreement thus are (1) mutuality; there must be a *συνάλλαγμα*, e. g. an act must be promised on the one side in return for an act on the other; (2) there must have been performance on one side; the mere bilateral agreement gives rise to no civil obligation: 'item emptio ac venditio nuda consentientium voluntate contrahitur, permutatio autem ex re tradita initium obligationi praebet, alioquin, si res nondum tradita sit, nudo consensu constitui obligationem dicemus, quod in his duntaxat receptum est, quae nomen suum habent, ut in emptione, venditione, conductione, mandato' Dig. 19. 4. 1. 2.

Such agreements are by the modern civilians called innominate (real) contracts; the Romans themselves do not call them 'contractus', and in fact have no general designation for them. Though they are roughly classified by Paulus according to the possible acts which might be the respective considerations for one another ('aut enim do tibi ut des, aut do ut facias, aut facio ut des, aut facio ut facias' Dig. 19. 5. 5 pr.), the more usual clue to their existence is the mention of the action by which they were pursued, the actio civilis in factum or praescriptis verbis (Tit. 24. 1 and 2 infr.), by which the party who had performed could exact counter performance or recover damages from the other; against him no action lay until such counter performance had ensued, so that, if that other refused to keep his promise, and his own part of the agreement had consisted in a 'dare', he could redemand what he had conveyed by the older remedy known as condictio causa data causa non secuta; or he was free to change his mind, and sue for reconveyance, as it is said, 'ex mera poenitentia': 'sed si tibi dedero, ut Stichum manumittas, si non facis, possum condicere, aut si me poeniteat, condicere possum' Dig. 12. 4. 3. 2.

That the general principle was only gradually developed is clear from a comparison of Dig. 19. 5. 5. 3 with 9. 15 and 22 of the same Title, and with Cod. 2. 4. 6; in the first of these passages Paulus says the actio praescriptis verbis will not lie in a case of facio ut des, in the others it is held applicable, so that probably it may be inferred that for some while

XV

DE VERBORUM OBLIGATIONE

Verbis obligatio contrahitur **ex interrogatione et responsu**, cum quid dari fierive nobis stipulamur. ex qua duae proficiscuntur actiones, tam condictio, si certa sit stipulatio, quam ex stipulatu, si incerta. quae hoc nomine inde utitur, quia stipulum apud veteres firmum appellabatur, forte a stipite descendens. G. iii. 92.

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only those agreements were enforceable by this remedy in which the part performance by which the action was supported was a conveyance (dare).

The commonest examples of innominate contract are permutatio, exchange, for which see Tit. 22. 2 infr.: aestimatum, the acceptance of property valued at a certain maximum under the condition of either returning it or paying the price at which it is valued: 'actio de aestimato proponitur tollendae dubitationis gratia, fuit enim magis dubitatum cum res aestimata vendenda datur, utrum ex vendito sit actio propter aestimationem, an ex locato, quasi rem vendendam locasse videar, an ex conducto, quasi operas conduxissem, an mandati: melius itaque visum est, hanc actionem proponi: quoties enim de nomine contractus ambigeretur, conveniret tamen aliquam actionem dari, dandam aestimatoriam praescriptis verbis actionem' Dig. 19. 3. 1 pr.: transactio or compromise, Dig. 2. 15, Cod. 2. 4. 6, and precarium or permissive occupancy, at any rate under the law of Justinian: 'cum quid precario rogatum est, non solum interdicto uti possumus, sed et incerti condictione, id est, praescriptis verbis' Dig. 43. 26. 2. 2: ib. 19. 2. But the practical value of the actio praescriptis verbis is best realized in cases which cannot certainly be regarded as within the principle of any named (i. e. real or consensual) contract, and in which the jurists said '*tutius esse*, praescriptis verbis agere'.

Tit. XV. As forms of verbal contract, distinct from stipulatio, are usually mentioned dotis dictio, votum, and iurata promissio liberti. The first, which had disappeared before Justinian, was the constitution of a dos in solemn form, open only to the woman with her guardian's auctoritas, her father or paternal ascendant, and her debtor acting by her instructions (Ulpian, Reg. 6. 2, Cic. pro Flacco 35. 86, pro Caec. 25. 72), but binding only if accepted; the form is preserved in Terence, Andr. 5. 4. 47 '*Chr.* dos, Pamphile, est decem talenta; *P.* accipio'; on which we have the commentary, 'ille nisi dixisset accipio dos non esset: datio enim ab acceptione confirmatur, nec potest videri datum id, quod non acceptum': cf. Seneca, Controv. 1. 6 'quidam dictas non accepere dotes'. Votum was a mere promise (pollicitatio) made for a religious purpose, or in favour of a church or pious foundation, Dig. 50. 12. 2. Lastly, a freedman on manumission could effectually bind himself to certain services to

G. iii. 92. **1** In hac re olim talia verba tradita fuerunt: **spondes? spondeo, promittis? promitto, fidepromittis? fidepromitto, fideiubes? fideiubeo, dabis? dabo, facies? faciam.** utrum autem Latina an Graeca vel qua alia lingua stipulatio concipiatur, nihil interest, scilicet si uterque stipulantium intellectum huius linguae habeat: nec necesse est eadem lingua

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his patron by mere oath, Dig. 38. 1. 7, which between ordinary persons imposed no actionable obligation whatever: cf. Tit. 10. 1 and note supr.

But the verbal contract κατ' ἐξοχήν is stipulation, a disposition in which the promisor bound himself by returning an oral, affirmative answer to the oral question of the promisee (stipulator), Cic. pro Caec. 3. Its essence lies, at any rate in the later periods of Roman law, not in the necessity of observing prescribed forms of words, but in the substantial correspondence between question and answer, and in the formal requirement of the presence of both parties: see on Tit. 19. 12 inf. This is no special kind of contract, differing from others in the sense in which sale differs from hire, or deposit from pledge; it is only a universal form into which any conceivable agreement can be thrown, and into which they frequently were thrown (even though actionable in themselves, e.g. sale, apart from the form) on account of the great superiority to creditors which stipulation possessed over the real and consensual contracts, except mutuum, in the nature of the action by which it could be enforced. That action, as is said in the text, was condictio: 'the short and sharp remedy' (as Mr. Poste calls it) 'which, when brought for certa pecunia credita, was the more formidable to a dishonest litigant, as it was accompanied by a sponsio poenalis, whereby the vanquished party forfeited a third of the sum in litigation, in addition, if he was defendant, to the original claim'. The action on the real and consensual contracts, on the other hand, was bonae fidei, and in many points favoured the defendant: see on Bk. iv. 6. 28 infr. For the difference between condictio certi, condictio triticaria, and actio ex stipulatu, see Gaius iv. 136, and references s. v. 'condictio' in the General Index.

Ihering (Geist, § 46, note 747) considers Justinian's derivation of stipulatio from stipulum, Paul. Sent. Rec. 5. 7. 1, in the sense of 'firm', 'settled', to be correct. Savigny connects it with stips, and uses Festus' interpretation of the word (stipem esse nummum signatum, testimonium esse et id, quod datur stipendium militi, et cum spondetur pecunia, quod stipulari dicitur) to support his theory that stipulation in origin rested on the fiction of a money loan. On the other hand, Isidorus says (Orig. 4. 24) 'dicta stipulatio a stipula: veteres enim, quando sibi aliquid promittebant, stipulam tenentes frangebant, quam iterum iungentes, sponsiones suas agnoscebant'.

§ **1**. The only form in which a stipulation could be originally concluded was 'spondes? spondeo'. So long as this was the case the contract was strictly iuris civilis, and no one could be a party to it who was not a civis: in fact, Gaius says, so peculiarly Roman was this form, that it could not

utrumque uti, sed sufficit congruenter ad interrogatum respondere: quin etiam duo Graeci Latina lingua obligationem contrahere possunt. sed haec sollemnia verba olim quidem in usu fuerunt, postea autem Leoniana constitutio lata est, quae sollemnitate verborum sublata sensum et consonantem intellectum ab utraque parte solum desiderat, licet quibuscumque verbis expressus est.

Omnis stipulatio aut pure aut in diem aut sub condicione 2 fit. pure veluti 'quinque aureos dare spondes?' idque confestim peti potest. in diem, cum adiecto die quo pecunia solvatur stipulatio fit: veluti 'decem aureos primis kalendis Martiis dare spondes?' id autem, quod in diem stipulamur, statim quidem debetur, sed peti prius quam dies veniat non potest: ac ne eo quidem ipso die, in quem stipulatio facta

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even be expressed in Greek, 'quamvis dicatur a Graeca voce figurata esse' (Festus, s. v. spondere, σπένδω, σπονδή), and he proceeds (iii. 94) to criticise as 'nimium subtiliter dictum' the opinion of those who held that there was an exception to this rule when the Roman emperor concluded a treaty of peace with an independent foreign monarch; for, as he adds, 'si quid adversus pactionem fiat, non ex stipulatu agitur, sed iure belli res vindicatur.' The other forms mentioned in the text, however, were iuris gentium, Gaius iii. 93, and therefore were open to peregrini no less than to cives, though it does not seem that in Gaius' time they might be expressed in any language; he mentions only Greek and Latin. The constitution of Leo, referred to in the text, and issued A. D. 472, ran 'omnes stipulationes, etiamsi non sollemnibus vel directis sed quibuscunque verbis consensu contrahentium compositae sunt legibus cognitae suam habeant firmitatem' Cod. 8. 38. 10. Some writers hold that, in consequence of this enactment, question and answer were no longer necessary, so long as the contract was made orally inter praesentes: but this does not seem certain. As early as the time of Paulus, who flourished about 200 A. D., the rule had become established that a document stating a promise made by one person to another established a presumption that there had been a genuine oral stipulation, though this could be rebutted by the defendant proving that he and the plaintiff had not met on the day of the alleged contract, so that no actual stipulation could have been possible, or that there had been no intention of making a stipulation, but only a pact, Dig. 2. 14. 7. 12, cited on Tit. 19. 17 inf. The rule stated in that § is taken literally from Paulus, Sent. Rec. 5. 7. 2. For Justinian's own enactment on the subject of written stipulations see Tit. 19. 12 inf. and notes, and cf. Excursus VIII (on Tit. 21) at the end of this Book.

§ 2. For condicio and dies see on Bk. i. 20. 1 supr., and for the expressions dies cedit, dies venit, on Bk. ii. 20. 20. The sense in which Justinian here uses the phrase in diem is not uniform: 'circa diem duplex

est, peti potest, quia totus dies arbitrio solventis tribui debet. neque enim certum est eo die, in quem promissum est, datum
3 non esse, priusquam praetereat. At si ita stipuleris, 'decem aureos annuos quoad vivam dare spondes?' et pure facta obligatio intellegitur et perpetuatur, quia ad tempus deberi non potest. sed heres petendo pacti exceptione submove-
4 bitur. Sub condicione stipulatio fit, cum in aliquem casum

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inspectio est: nam vel ex die incipit obligatio, aut confertur in diem: ex die, veluti Kal. Martiis dare spondes? cuius natura haec est, ut ante diem non exigatur, ad diem autem "usque ad Kalendas dare spondes?"' The confusion perhaps arises from the fact that where a stipulation is ex die, in the sense of the passage cited, the solutio is 'dilata in diem', as is said in Dig. 45. 1. 46 pr. The rule laid down by Justinian about such promises may be otherwise expressed by saying that until the arrival of the dies the obligatio is naturalis only, and cannot be sued upon; but if the promisor voluntarily pays before the time, he cannot recover what he has paid as indebitum, and there is a commodum repraesentationis (ii. 20. 14 supr.) in favour of the promisee; 'in diem debitor adeo debitor est, ut ante diem solutum repetere non possit' Dig. 12. 6. 10. With the latter part of the section cf. Tit. 19. 26 inf.

§ 3. Dr. Hunter (Roman Law, p. 465) seems to be wrong in affirming this rule of obligations generally, in spite of the universality of the expression 'ad diem deberi non potest'. In fact, it is true only of stipulation, and its reason is the strict nature of the contract, in which the intention was less regarded than the words. It has no application to legacies, for 'in condicionibus testamentorum voluntatem potius quam verba considerari oporteat' Dig. 35. 1. 101 pr.; accordingly a bequest of an annuity for a person's lifetime was construed as a number of separate bequests, that of the first annual payment being made 'pure', the following ones under the suspensive condition of the legatee's living to the day on which they respectively fell due, Dig. 38. 1. 4; ib. 8; 36. 2. 10. For a case of innominate contract in conflict with Dr. Hunter cf. Dig. 2. 14. 52. 3 'de inofficioso patris testamento acturis, ut eis certa quantitas, quoad viveret heres, praestaretur, pactus est: produci ad perpetuam praestationem id pactum postulabatur: rescriptum est neque iure ullo neque aequitate tale desiderium admitti'. Even before the introduction of the exceptiones pacti and doli the harsh result of the rule might be avoided by couching the stipulation in a different form; instead of promising an annuity of 100 aurei for five years, 500 might be promised in five equal shares ex die; or instead of promising 100 per annum for a person's lifetime, a number of separate promises of 100 might be made ex die, each under the suspensive condition of the promisee's living to such or such a birthday.

§ 4. We have seen (§ 2 supr.) that an immediate, though not necessarily a civil, obligation arose from a promise ex die; e. g. Kalendis Martiis dare spondes? A promise made subject to a suspensive condition—e. g. si

differtur obligatio, ut, si aliquid factum fuerit aut non fuerit, stipulatio committatur, veluti 'si Titius consul factus fuerit, quinque aureos dare spondes?' si quis ita stipuletur 'si in Capitolium non ascendero, dare spondes?' perinde erit, ac si stipulatus esset cum morietur dari sibi. ex condicionali stipulatione tantum spes est debitum iri, eamque ipsam spem transmittimus, si, priusquam condicio existat, mors nobis
contigerit. Loca etiam inseri stipulationi solent, veluti 'Car- 5

Titius consul fuerit factus—might at first sight seem to have no legal effect at all: 'ante condicionem non recte agi, cum nihil ad interim debeatur' Dig. 20. 1. 13. 5. Yet this is clearly not so in fact; for (1) it is said in the text that the promisee's hope of the condition being fulfilled, and of the debt so springing into actual existence, passes to his heres; if the conditional promise had no effect until condicio existit there could be nothing to pass to the heir at all, cf. Tit. 19. 25 inf. It was otherwise with legacies, on account of their strictly personal nature: unless the condition were fulfilled before the legatee's decease the latter's heir was not benefited, Dig. 36. 2. 5 pr. and 2, Cod. 6. 51. 7; cf. note on Bk. ii. 20. 20 supr. (2) The person who will be bound to an act or forbearance on the fulfilment of the condition is unable by any act of his own to escape his possible liability in the future: pro tanto he is bound already. This may be illustrated by Dig. 17. 2. 27 'si (socius) sub condicione promiserat et distracta societate condicio extitit, ex communi solvendum est', Dig. 45. 1. 78 pr. 'si filius familias sub condicione stipulatus emancipatus fuerit, deinde extiterit condicio, patri actio competit'; cf. Dig. 20. 1. 13. 5; 45. 3. 26. (3) Even more direct is Dig. 44. 7. 42 pr. 'is, cui sub condicione legatum est, pendente condicione non est creditor, sed tunc cum extiterit condicio, quamvis eum, qui stipulatus est sub condicione, placet etiam pendente condicione *creditorem esse*.' Dig. 12. 6. 16, however, shows that the language here is unguarded, and that until the condition was fulfilled there was no real obligatio, even naturalis, for if payment were made pendente condicione the money could be recovered by condictio indebiti: cf. Dig. ib. 18; ib. 44; ib. 56. Thus the legal position of a promisee sub condicione is difficult to describe; there is as yet no obligation, and yet he is not absolutely without right; the effect of the promise until the condition is fulfilled is only, as Fitting calls it, 'preliminary' (*Vorwirkung*). If the condition was purely 'potestative' on the promisor's side, depending merely on his will and not on any act of his, the promise was void: illam autem stipulationem 'si volueris dari' inutilem esse constat: Dig. 45. 1. 46. 3.

§ 5. An obligation may possibly be performable only in one place, as happens often in connection with immoveable property. In some cases again (as in the text) the place at which performance should be made is fixed, either expressly or by implication, by the parties. If this is so, the debtor is neither bound nor entitled to perform elsewhere, though, if the action by which the obligation was pursued was bonae fidei (or even

thagine dare spondes?' quae stipulatio licet pure fieri videatur, tamen re ipsa habet tempus iniectum, quo promissor utatur ad pecuniam Carthagine dandam. et ideo si quis ita Romae stipuletur 'hodie Carthagine dare spondes?' inutilis
6 erit stipulatio, cum impossibilis sit repromissio. Condiciones, quae ad praeteritum vel ad praesens tempus referuntur, aut statim infirmant obligationem aut omnino non differunt: veluti 'si Titius consul fuit' vel 'si Maevius vivit, dare spondes?' nam si ea ita non sunt, nihil valet stipulatio: sin autem ita se habent, statim valet. quae enim per rerum naturam certa sunt, non morantur obligationem, licet apud nos incerta sint.

7 Non solum res in stipulatum deduci possunt, sed etiam facta: ut si stipulemur fieri aliquid vel non fieri. et in huiusmodi stipulationibus optimum erit poenam subicere, ne

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stricti iuris, if demanding a facere) the creditor might *sue* elsewhere, the advantage or disadvantage accruing to the defendant being taken into account in fixing the damages. When the obligation was to convey (dare) a definite object or quantitas at a definite place, this could not be done until after the introduction of the praetorian arbitraria actio 'de eo quod certo loco dari oportet', Bk. iv. 6. 31 and 33 inf. In all other cases (i. e. where no place was fixed for the performance), the debtor was entitled to perform wherever he found the creditor, unless the place was bona fide inconvenient, Dig. 46. 3. 39, and was bound to perform at any place in which, should he refuse, the creditor actually obtained a judgment against him. The only exceptions to this are (1) that an heir cannot be compelled to pay legacies elsewhere than where the greater part of the inheritance is, Dig. 5. 1. 50 pr., (2) that where a man has to deliver a specific thing or quantity, he cannot be compelled to do this elsewhere than where the thing or quantity actually is, unless the creditor will take the risk and pay the cost of removal, Dig. 5. 1. 38.

§ **6**. Where a condition is really satisfied, though upon this point there may be a subjective uncertainty—e. g. where A, not knowing that Titius has been consul, promises ten aurei if such is the case, the obligation is not really conditional, but absolute; hence legacies subject to such apparent conditions devolved on the heir of the legatee if the latter outlived the testator.

§ **7**. Cf. Dig. 45. 1. 2 pr. 'stipulationum quaedam in dando, quaedam in faciendo consistunt'. The advantage of the course recommended in the text was twofold. The promisee was saved the trouble of proving 'quid sua intersit' ('plerumque difficilis probatio est, quanti cuiusque intersit, et ad exiguam summam deducitur' Dig. 46. 5. 11); and if the contract came to be sued upon, the ground of action was not the promise to do, but the promise to pay so much in default, so that the remedy,

quantitas stipulationis in incerto sit ac necesse sit actori probare, quid eius intersit. itaque si quis ut fiat aliquid stipuletur, ita adici poena debet: 'si ita factum non erit, tum poenae nomine decem aureos dare spondes?' sed si quaedam fieri, quaedam non fieri una eademque conceptione stipuletur, clausula erit huiusmodi adicienda: 'si adversus ea factum erit sive quid ita factum non erit, tunc poenae nomine decem aureos dare spondes?'

XVI

DE DUOBUS REIS STIPULANDI ET PROMITTENDI

Et stipulandi et promittendi duo pluresve rei fieri possunt. stipulandi ita, si post omnium interrogationem promissor respondeat 'spondeo'. ut puta cum duobus separatim stipulantibus ita promissor respondeat 'utrique vestrum dare spondeo': nam si prius Titio spoponderit, deinde alio interrogante spondeat, alia atque alia erit obligatio nec creduntur duo rei stipulandi esse. duo pluresve rei promittendi ita fiunt: 'Maevi, quinque aureos dare spondes? Sei, eosdem

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instead of being the actio ex stipulatu, was until Justinian's time condictio certi with its penal sponsio of one third of the sum in dispute: 'cum quis non adiecerit poenam . . . incerti agendum esse' Dig. 2. 5. 3. There is also reason to believe that in the earliest period of the contract, stipulations for the payment of a sum of money alone were valid, so that the only practical mode of stipulating for anything else was to make the payment of a sum of money conditional on the non-performance of the act desired. If no interval was fixed for the performance of an act secured by a penalty, the latter could be sued for unless the act was performed within a reasonable time: 'intra quantum autem temporis, nisi detur quod arbiter iusserit, committatur stipulatio, videndum est, et si quidem dies adiectus non sit, Celsus scribit libro ii° Digestorum inesse quoddam modicum tempus: quod ubi praeterierit, poena statim peti potest' Dig. 4. 8. 21. 12. The amount of the poena had no measure except the will of the parties, and it might be recovered in full, even though largely exceeding the value of the act or forbearance stipulated for, Dig. 4. 8. 32 pr.; 21. 2. 56. In English law this is different: 8 and 9 Will. III. c. 11; 4 and 5 Anne, c. 16; 23 and 24 Vict. c. 126; cf. Sir W. R. Anson's Law of Contract, 9th ed. p. 278.

Tit. XVI. For solidary and correal obligation (with one of the modes of creating which latter this Title deals) see Excursus VII at the end of this Book. The presumption of law was against joint liability, but it could be rebutted by the order of the stipulations: for if the answer were made to the same question put by two stipulators successively, there could not be two obligations, because the first would be invalidated by

quinque aureos dare spondes ?' respondeant singuli separatim
1 'spondeo'. Ex huiusmodi obligationibus et stipulantibus solidum singulis debetur et promittentes singuli in solidum tenentur. in utraque tamen obligatione una res vertitur: et vel alter debitum accipiendo vel alter solvendo omnium
2 peremit obligationem et omnes liberat. Ex duobus reis promittendi alius pure, alius in diem vel sub condicione obligari potest: nec impedimento erit dies aut condicio, quo minus ab eo qui pure obligatus est petatur.

XVII

DE STIPULATIONE SERVORUM

Servus ex persona domini ius stipulandi habet. sed hereditas in plerisque personae defuncti vicem sustinet: ideoque quod servus hereditarius ante aditam hereditatem stipulatur adquirit hereditati ac per hoc etiam heredi postea facto
1 adquiritur. Sive autem domino sive sibi sive conservo suo sive impersonaliter servus stipuletur, domino adquirit. idem iuris est et in liberis, qui in potestate patris sunt, ex quibus
2 causis adquirere possunt. Sed cum factum in stipulatione continebitur, omnimodo persona stipulantis continetur, veluti si servus stipuletur, ut sibi ire agere liceat: ipse enim tantum

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the interposition of the second, so that correality or joint liability results from the principle 'ubi ambigua oratio est, commodissimum est id accipi, quo res, de qua agitur, magis valeat quam pereat' Dig. 34. 5. 12.

§ 1. The characteristics pointed out in this section do not serve to draw the line between solidary and correal obligation: see Excursus VII.

Tit. XVII. A slave became personally entitled as promisee in a contract only where he had no master, or where the master was himself the promisor—here because no one could simultaneously be debtor and creditor in the same obligation: but in both cases the obligatio was naturalis only, and did not become civilis even by the slave's manumission. For exceptions to the rule 'hereditas defuncti vicem sustinet' see Dig. 41. 1. 61. 1; 45. 3. 26; 47. 2. 68; 47. 4. 1. 15.

§ 1. For 'ex quibus causis adquirere possunt' cf. 'si quid ex re patris ei obveniat, . . . hoc parenti adquirat' Bk. ii. 9. 1 and notes supr.: note on Tit. 28 pr. inf.

§ 2. By factum here is meant something which is not a right, and therefore cannot become part of the property (*Vermögen*) of the dominus, e. g. Detention, or the mere personal license to cross land (which is not a servitude) suggested in the text: 'quod dicitur patrem filio utiliter stipulari, quasi sibi ille stipularetur, hoc in his verum est, quae iuris sunt quaeque adquiri patri possunt: alioquin si *factum* conferatur in personam

prohiberi non debet, non etiam dominus eius. Servus com- 3
munis stipulando unicuique dominorum pro portione dominii adquirit, nisi si unius eorum iussu aut nominatim cui eorum stipulatus est: tunc enim soli ei adquiritur. quod servus communis stipulatur, si alteri ex dominis adquiri non potest, solidum alteri adquiritur, veluti si res quam dari stipulatus est unius domini sit.

XVIII

DE DIVISIONE STIPULATIONUM

Stipulationum aliae iudiciales sunt, aliae praetoriae, aliae conventionales, aliae communes tam praetoriae quam iudiciales. Iudiciales sunt dumtaxat, quae a mero iudicis officio 1
proficiscuntur: veluti de dolo cautio vel de persequendo servo qui in fuga est restituendove pretio. Praetoriae, quae a mero 2

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filii, inutilis erit stipulatio, velut ut tenere ei vel ire agere liceat' Dig. 45. 1. 130; ib. 38. 6–8.

§ 3. Cf. Tit. 28. 3 inf. In the time of Gaius (iii. 167 *a*) it was a question between the two schools whether a stipulation made by a slave 'unius domini iussu' enured to that master's sole benefit: the view adopted by Justinian was that of the Sabinians.

Tit. XVIII. Judicial and praetorian stipulations correspond to some of the English contracts of record, e. g. recognisances: they are so-called contracts entered into by one party to a judicial or quasi-judicial proceeding for the security or protection of the other at the order of the judge or magistrate. Dr. Hunter observes (Roman Law, p. 290) that their real meaning is the weakness of the executive: 'it is much easier to get a man to promise not to do some particular thing, than, when it is done, to acknowledge it to be wrong, or to give compensation.' The division into judicial, praetorian, and common must have practically become unmeaning after the abolition of the ordo iudiciorum privatorum and with it of the distinction between magistrate and iudex, ius and iudicium.

§ 1. The de dolo cautio seems to have chiefly, if not solely, occurred in cases where bona fide possessors were sued by the owner: 'si post acceptum iudicium possessor usu hominem cepit, debet eum tradere eoque nomine de dolo cavere: periculum est enim ne eum vel pigneraverit vel manumiserit' Dig. 6. 1. 18, ib. 45; its purpose apparently was to secure the plaintiff against loss arising from possible misdealing with the property in the past, or even in the future, before it came into his hands. The cautio de persequendo, etc. was employed where a man got possession of another's slave, who then ran away, Dig. 4. 2. 14. 11, or where a slave bequeathed by a testator was enabled to decamp by the fault of the heir, Dig. 30. 47. 2.

§ 2. There is a reference in Gaius iv. 31 to an obsolete procedure on

praetoris officio proficiscuntur, veluti damni infecti vel legatorum. praetorias autem stipulationes sic exaudiri oportet, ut in his contineantur etiam aedilitiae: nam et hae ab iuris-
3 dictione veniunt. Conventionales sunt, quae ex conventione utriusque partis concipiuntur, hoc est neque iussu iudicis neque iussu praetoris, sed ex conventione contrahentium. quarum totidem genera sunt, quot paene dixerim rerum
4 contrahendarum. Communes sunt stipulationes veluti rem salvam fore pupilli: nam et praetor iubet rem salvam fore pupillo caveri et interdum iudex, si aliter expediri haec res non potest: vel de rato stipulatio.

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damnum infectum, which had been superseded by the praetor's provision, by which any one who apprehended damage to land or a house from the defective condition of another house or piece of land could require certain others, having rights over the latter, to enter into the cautio damni infecti, i. e. an express promise to make compensation for any such damage which actually occurred: the terms of the Edict are given in Dig. 39. 2. 7 pr. The right belonged not only to the owner of the threatened tenement, but also to persons having other real rights over it, or even detention in virtue of an obligation, Dig. 39. 2. 13, ib. 38 pr., but not to a bona fide possessor, Dig. ib. 11, ib. 13. 9: the cautio could be exacted from the owner, bona fide possessor (ib. 13 pr.), and others having iura in alieno solo, but it would not be granted if the person threatened already had a remedy in virtue of some relation actually existing between him and the other (e. g. lessee and lessor, Dig. ib. 32, ib. 13. 6); and it was not perpetual, but remained in force only for the period prescribed by the magistrate, Dig. ib. 4 pr. If not entered into within the time fixed at the hearing, the other party could claim to be put in possession of the dangerous tenement by a magisterial decree, in order to examine into its condition and take measures of precaution, though without power to exclude his opponent: and if, after the lapse of another interval, the latter had not given the required promise, his right passed by a second decree to the complainant, or, if inalienable, was extinguished.

The cautio legatorum (servandorum causa) was employed when a legacy was given under a condition or ex die, or was disputed: the legatee being entitled to security with sureties for its future payment, if it actually became due; in default he could claim to be put in possession, Dig. 36. 4. 5 pr., 5 and 16. Through his charge of the market, streets, public buildings, etc. (p. 22 supr.) the aedile had frequent occasion to impose duties by the means described in this Title; e. g. the stipulationes dupli, described on Tit. 23. 3 inf., originated, according to Theophilus, in his Edict.

§ 4. For the stipulatio rem salvam fore pupilli see Bk. i. 24 pr. and note supr. That de rato (or more fully, ratam rem dominum habiturum) was employed when suits were conducted by agents, Bk. iv. 11 pr. inf.

XIX

DE INUTILIBUS STIPULATIONIBUS

Omnis res, quae dominio nostro subicitur, in stipulationem
deduci potest, sive illa mobilis sive soli sit. At **si quis rem,** 1
quae in rerum natura non est aut **esse non potest, dari** stipu-
latus fuerit, veluti Stichum, **qui mortuus sit, quem vivere** G. iii. 97.

Tit. XIX. The contents of this Title are heterogeneous and badly arranged. Some of the sections, though professedly dealing with the grounds on which stipulations are invalid, relate to causes affecting all obligations (e.g. 1. 2. 6. 13): in fact only §§ 5. 7. 12. 17 and 18 apply to stipulations exclusively: the rest form a disconnected account of some of the causes which invalidate contracts in their inception, especially impossibility of performance, §§ 1 and 2: impossible conditions, § 11, and disregard of the general principle that a contract can impose duties and confer rights only on those who are parties to it, §§ 3. 4. 19–21.

By 'res quae dominio nostro subiciuntur' are meant 'res in patrimonio nostro': *πρᾶγμα, ὃ τῇ ἡμετέρᾳ ὑποπίπτειν δύναται δεσποτείᾳ* Theoph.

§ 1. The ground of nullity in this and the following section is the impossibility of performing the act which is the object of the obligation. An act or forbearance either may be impossible ab initio, i. e. at the time at which the contract was made; or it may become impossible subsequently and ex post facto. Original impossibility again may be either absolute, as where no one can perform the act (e. g. this section), or relative, as where, though the particular promisor cannot perform it, another can.

A promise to perform an act which is absolutely impossible ab initio is void: it confers no rights and imposes no duties (for 'impossibilium nulla obligatio est' Dig. 50. 17. 185), unless the promisee was ignorant, through no fault of his own, of the impossibility, and through having acted on the contract as though actually subsisting cannot be restored in statum quo ante: in this case the promisor must indemnify him for any loss which he has sustained, Dig. 18. 4. 8: cf. Dig. 11. 7. 8. 1. Disappearance of the impossibility validates the contract only if, so to speak, it is natural, not accidental, § 2 inf., Dig. 45. 1. 83. 5. If the original impossibility is relative only, the validity of the contract is in no way affected: 'multum interest, utrum ego stipuler rem, cuius commercium habere non possum, an quis promittat: si stipuler . . . inutilem esse stipulationem placet: si quis promittat . . . ipsi nocere, non mihi' Dig. 45. 1. 34.

Where the impossibility arises ex post facto, its absoluteness or relativity is immaterial: the only question is whether it is due or not to the fault of the debtor, provided of course that it is a fault for which, in the particular relation, he is answerable (Excursus VI inf.); if not, he is released (sine facto promissoris, § 2 inf.): cf. Tit. 14. 2 supr., Dig. 45. 1. 37 'si certos nummos, puta qui in arca sint, stipulatus sim, et hi sine culpa promissoris perierint, nihil nobis debetur'; though this exemption

credebat, aut **hippocentaurum**, qui esse non possit, inutilis erit
2 stipulatio. Idem iuris est, si rem **sacram aut religiosam**, quam **humani iuris** esse credebat, vel publicam, quae usibus populi perpetuo exposita sit, ut forum vel theatrum, vel **liberum hominem, quem servum esse credebat**, vel cuius
G. iii. 99. commercium non habuit, vel **rem suam dari quis stipuletur.** nec in pendenti erit stipulatio ob id, quod publica res in privatum deduci et ex libero servus fieri potest et commercium adipisci stipulator potest et res stipulatoris esse desinere potest: sed protinus inutilis est. item contra licet initio utiliter res in stipulatum deducta sit, si postea in earum qua causa, de quibus supra dictum est, sine facto promissoris devenerit: extinguitur stipulatio. ac ne statim ab initio talis stipulatio valebit 'Lucium Titium cum servus erit dare spondes?' et similia: quia natura sui dominio nostro exempta
3 in obligationem deduci nullo modo possunt. Si quis alium

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from performance is not absolute, but only coextensive with the impossibility, Tit. 23. 3 inf. If, on the contrary, the impossibility is due to the promisor's fault, he is bound to compensate the promisee, though he is entitled to a transfer of the latter's rights of action against other persons in respect of the object: 'si fullo aut sarcinator vestimenta perdiderit eoque nomine domino satisfecerit, necesse est domino vindicationem eorum et condictionem cedere' Dig. 19. 2. 25. 8.

§ 2. Contracts other than stipulation in respect of (e. g.) a free man, whom the party believed to be a slave, were valid: see on Tit. 23. 5. inf. By 'cuius commercium non habuerit' seems to be meant loss of commercium by the stipulator: cf. inf. 'commercium adipisci stipulator.' For the ground of nullity of such a condition as 'si ex libero servus fiat', already stated on § 1, cf. Dig. 45. 1. 83. 5 'ut ne haec quidem stipulatio de homine libero probanda sit, illum cum servus erit dare spondes? . . . quia ea duntaxat quae natura sua possibilia sunt deducuntur in obligationem, . . . et casum adversamque fortunam spectari hominis liberi neque civile neque naturale est', Dig. 50. 17. 29 'quod initio vitiosum est, non potest tractu temporis convalescere'. A stipulation for conveyance of res sua which the stipulator believed to be aliena was void because 'id quod alicuius est ei dari non potest': to make a man owner (dare) of what was already his own was an absolute impossibility, Gaius iii. 99.

§ 3. A promise by A that B shall do or forbear as a rule imposes no obligation on either A or B: but

(1) A will be bound (*a*) if his promise is secured by a poena, § 21 inf., Dig. 45. 1. 38. 2: (*b*) if he promises either expressly (as is said in the text) or impliedly to get B to do the act: for the readiness with which such a promise would be implied cf. Dig. 45. 1. 81 pr. 'quotiens quis alium sisti (shall appear in court) promittit nec adicit poenam . . . . quaeritur an

daturum facturumve quid spoponderit, non obligabitur, veluti si spondeat Titium quinque aureos daturum. quodsi effecturum se, ut Titius daret, spoponderit, obligatur. **Si quis** alii, quam 4 G.iii.103. **cuius iuri subiectus** sit, **stipuletur,** nihil agit. plane solutio etiam in extranei personam conferri potest (veluti si quis ita stipuletur 'mihi aut Seio dare spondes?'), ut obligatio quidem stipulatori adquiratur, solvi tamen Seio etiam invito eo recte possit, ut liberatio ipso iure contingat, sed ille adversus Seium

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committatur stipulatio: et Celsus ait, etsi non est huic stipulationi additum "nisi steterit, poenam dari", in id, quanti interest sisti, contineri . . nam qui alium sisti promittit, promittit id se acturum, ut stet'. In both cases A really promises to do something himself.

(2) B will be bound (*a*) if A is his messenger, intermediary, or agent: see Excursus IX at the end of this Book. If A acts as his negotiorum gestor (unauthorized agent) and B refuses to ratify, A is answerable for loss accruing to the promisee only if the latter believed him to be authorized; (*b*) if he is A's heir: for this see § 13 and notes inf.

Sometimes, however, a person incurred liability under a contract in which he was not directly a party, and was not even so much as named: in particular (*a*) the paterfamilias or dominus on certain contracts of his son or slave, Bk. iv. 7 inf.; (*b*) the principal on contracts made for him by his agent, and (*c*) the pupil on reaching puberty was suable by actio utilis on contracts made in relation to his affairs by his guardian: 'si impuberis nomine tutor vendiderit, evictione secuta Papinianus . . . . ait dari in eum cuius tutela gesta sit utilem actionem, sed adicit in id demum, quod rationibus eius accepto latum est' Dig. 21. 2. 4. 1: cf. Dig. 26. 7. 12. 1.

§ 4. A promise by A to B to do something for C as a rule (unless B is C's filiusfamilias or slave) confers no rights on either B or C; not on B, because he has no interest, the promise not being to do something for him, 'inventae sunt enim huiusmodi obligationes ad hoc ut unusquisque sibi adquirat quod sua interest', § 19 inf.; and not on C, because he is no party in the contract. But

(1) B will acquire a right under the promise (*a*) if by the performance to C he himself obtains a benefit, or if non-performance will impose on him some liability or cause him a detriment, § 20 inf., and this is the reason why the pater or dominus is entitled under a promise made to him of performance to his filiusfamilias or slave; the limits to the right are marked by the passage cited from Dig. 45. 1. 131 on Tit. 17. 2 supr.: cf. Cod. 8. 39. 3; (*b*) if he has stipulated for a poena in default of performance, § 19 inf.: for here the promise is to do something for him personally.

(2) C will acquire a right under the promise not only, as is said here, if he is the promisee's dominus or pater, but also in a number of other cases, of which the following are the most important: (*a*) if the promisee

habeat mandati actionem. quod **si quis sibi** et alii, **cuius iuri subiectus non sit,** decem **dari** aureos **stipulatus est,** valebit quidem **stipulatio :** sed utrum totum debetur quod in stipulatione deductum est, an vero pars dimidia, dubitatum est: sed placet non plus quam partem **dimidiam ei** adquiri. ei qui tuo iuri subiectus est si stipulatus sis, tibi adquiris, quia vox tua tamquam filii sit, sicuti filii vox tamquam tua in-

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is merely his messenger or intermediary (but not agent), and the contract is real or consensual (i.e. not a stipulation), Dig. 2. 14. 2 pr.: 13. 5. 14. 3; (*b*) if the transaction is a mutuum given, or an indebitum paid, by B in C's name C can bring the condictio in person, Dig. 12. 1. 2. 4; (*c*) a pupil could sue by actio utilis on a constitutum made by his guardian in his name, and plead the exceptio doli if sued by his creditor with whom the guardian had made a pactum de non petendo on his behalf, Dig. 2. 14. 15; ib. 28. 1; (*d*) where performance was promised to a man and his heir: 'suae personae adiungere quis heredis personam potest' Dig. 45. 1. 38. 14, though this is in reality no exception to the general rule. But if A promised B to do so and so for his (B's) heir (and not for himself) the promise was void, Gaius iii. 158; this was altered by Justinian, Cod. 8. 38. 11; cf. § 13 inf. (*e*) If a gift were made by B to A on condition of its transfer to C, Cod. 8. 53. 3. (*f*) If in settling a dos on a woman its restoration to her or her descendants was stipulated for, Dig. 24. 3. 45, Cod. 5. 14. 7. (*g*) If property was deposited with or lent to A by B on condition of its being given up to C, Cod. 3. 42. 8.

Sometimes, however, a person acquired rights under a contract in which he was not directly a party, and was not even so much as named: in particular (*a*) where the promisee was a slave or filiusfamilias: see on Tit. 17. 1 supr.; (*b*) where the contract was made by a guardian with reference to his pupil's property the latter could sue by actio utilis, Dig. 12. 1. 26; (*c*) where the right of the actual promisee would be deprived of value unless, if necessary, the third person is allowed to appeal to the contract: 'cum alio conventio facta prodest, sed tunc demum, cum per eum, cui exceptio datur, principaliter ei, qui pactus est, proficiat' Dig. 2. 14. 23; for an illustration see what is said as to the pactum de non petendo concluded by one of two or more correi debendi in Excursus VII inf.

Where a promise is made to me of performance to me *or* Seius, the latter is said to be 'solutionis causa adiectus'; as Justinian says, the promisor is entitled to release himself by performance to him, and of this right I cannot deprive him; but as there is no obligation between him and the promisor he cannot compel performance, or enter into any disposition with the promisor affecting it, such as novatio, acceptilatio, or compensatio.

But if a promise is made to me of performance to me *and* Seius, Seius acquires no right whatever; the only question being what right I acquire myself. The Sabinians had held that I could claim the whole of what

tellegitur in his rebus quae tibi adquiri possunt. Praeterea **inutilis est stipulatio, si quis ad ea quae interrogatus erit non responderit, veluti si decem** aureos **a te dari stipuletur, tu quinque promittas,** vel contra: **aut si ille pure stipuletur, tu sub condicione promittas,** vel contra, si modo scilicet id exprimas, id est si cui sub condicione vel in diem stipulanti tu respondeas: 'praesenti die spondeo.' nam si hoc solum respondeas 'promitto', breviter videris in eandem diem aut condicionem spopondisse: nec enim necesse est in respondendo 5 G.iii.102.

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had been promised; the view confirmed by Justinian was that of the other school, Gaius iii. 103. Mr. Poste, referring to Dig. 18. 1. 64, remarks that the Sabinian rule was retained in formless contracts; it would perhaps be more correct for 'formless' to substitute 'giving rise to bilateral obligation'.

Conversely, if A promises that he *or* B will do so and so (he not being B's agent), he is bound to do the whole; if that he *and* B will do it, he is liable only in a moiety, Nov. 115. 2.

§ 5. The statement of the rule in the text, which is taken from Gaius iii. 102, can hardly stand in the face of passages in the Digest in which the contrary doctrine is emphatically laid down by other leading jurists, viz. Ulpian, 'si stipulanti mihi decem tu viginti respondeas, non esse contractam obligationem nisi in decem constat; ex contrario si me viginti interrogante tu decem respondeas, obligatio nisi in decem non erit contracta . . . . manifestissimum est viginti et decem inesse' Dig. 45. 1. 1. 4: so Paulus in Dig. 50. 17. 110; 45. 1. 83. 3, and Pomponius, 'si ita stipulatus fuero, decem aut quinque dari spondes, quinque debentur; et si ita, Kalendis Ianuariis vel Februariis dari spondes, perinde est quasi Kalendis Februariis stipulatus sim' Dig. 45. 1. 12.

§ 6. Gaius says (iii. 104) that a person in mancipio resembled a slave in being unable to incur an obligation to any one. All that is meant by the text is that between domestic superior and inferior there could be no civilis obligatio; but if a pater stipulated from his son, or a master from his slave, the son or slave was bound 'naturally'; 'patre a filio vel domino a servo stipulato fideiussor acceptus tenetur' Dig. 46. 1. 56. 1; cf. Tit. 20. 1 inf.; in the converse case it seems from Dig. loc. cit. that no obligation of any sort resulted. Contracts made by a filiusfamilias with other persons than his pater bound him civiliter always, 'et ob id agi cum eo tanquam cum patrefamilias potest' Dig. 44. 7. 39; but a slave was bound only naturaliter by contracts even with extranei, and the obligatio incurred by an extraneus was also, so far as the slave went, naturalis only, though the dominus could sue upon it: 'ex contractibus [servi] civiliter non obligantur, sed naturaliter et obligantur et obligant' Dig. 44. 7. 14; 45. 1. 1 pr. Civil obligation between paterfamilias and filius seems to have been prevented by the latter's want of proprietary right; when the incapacity was partly removed, the rule was pro tanto given up, and in respect of peculium

G. iii. 104. 6 eadem omnia repeti, quae stipulator expresserit. Item **inutilis est stipulatio, si** ab **eo stipuleris, qui iuri tuo subiectus est,** vel **si is a te stipuletur. sed servus quidem non solum** domino suo **obligari non potest, sed ne alii quidem ulli :** filii
G. iii. 105. 7 vero familias aliis obligari possunt. **Mutum neque stipulari neque promittere posse palam est.** quod **et in surdo receptum est : quia et is qui stipulatur verba promittentis et is qui promittit verba stipulantis audire debet.** unde apparet non de eo nos loqui qui tardius exaudit, sed de eo qui omnino non
G. iii. 106. 8 exaudit. **Furiosus nullum negotium gerere potest, quia non intellegit quid agit. Pupillus omne negotium recte gerit : ut**
G. iii. 107. 9 **tamen, sicubi tutoris auctoritas necessaria sit, adhibeatur tutor, veluti si ipse obligetur : nam alium sibi obligare etiam sine**
G. iii. 109. 10 **tutoris auctoritate potest. Sed quod diximus de pupillis, utique de his verum est, qui iam aliquem intellectum habent : nam infans et qui infanti proximus est non multum a furioso distant, quia huius aetatis pupilli nullum intellectum habent :**

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castrense there could be civil obligation and consequently litigation between them : 'lis nulla nobis esse potest cum eo quem in potestate habemus, nisi ex castrensi peculio' Dig. 5. 1. 4 ; cf. Dig. 18. 1. 2 pr. ; 47. 2. 52. 4–6. In respect of peculium adventitium this relaxation is not recognised in the authorities.

§ 8. The incapacity of furiosus to contract is in reality based on incapacity of willing, or of action entailing legal consequences, rather than on defect of intelligence : 'furiosum, sive stipuletur, sive promittat, nihil agere natura manifestum est. Huic proximus est, qui eius aetatis est ut nondum intellegat, quid agatur, sed quod ad hunc benignius acceptum est, nam qui loqui potest, creditur et stipulari et promittere posse' Dig. 44. 7. 1. 12 and 13, 'in negotiis contrahendis alia causa habita est furiosorum, alia eorum, qui fari possunt, quamvis actum rei non intelligerent : nam furiosus nullum negotium contrahere potest, pupillus omnia tutore auctore agere potest' Dig. 50. 17. 5. Dispositions made by a furiosus in a lucid moment were, however, completely valid and binding, Cod. 5. 70. 6 ; cf. Bk. ii. 12. 1 supr.

§ 10. Infantes are children under seven years of age : 'si infanti, id est minori septem annis' Cod. 6. 30. 18 pr., 'prima aetas infantia est . . . quae porrigitur in septem annis' Isidor. Orig. 11. 2. Pubertas was fourteen in males, twelve in females, Bk. i. 22 pr. supr. ; but to the question when an impubes ceased to be infanti proximus, and when he began to be pubertati proximus, no clear answer is to be found in the texts. Savigny rejects the view of those who would decide this by dividing the seven (or five) years immediately succeeding infantia into two equal portions on the ground that, on the clear meaning of the

sed in proximis infanti propter **utilitatem** eorum **benignior iuris interpretatio facta est,** ut idem iuris habeant, quod pubertati proximi. sed qui in parentis potestate est impubes, nec auctore quidem patre obligatur. Si impossibilis **condicio** **11** G. iii. 98. obligationibus adiciatur, nihil valet **stipulatio.** Impossibilis autem condicio habetur, cui natura impedimento est, quo minus existat, **veluti** si quis ita dixerit: 'si **digito caelum attigero,** dare spondes?' at si ita stipuletur, 'si digito caelum non attigero, dare spondes?' pure facta obligatio intellegitur ideoque statim petere potest. Item verborum obligatio inter **12** absentes concepta inutilis est. sed cum hoc materiam litium Cf. G. iii. 138.

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terms, there must be an interval in every child's life when he is neither infantiae nor pubertati proximus, and inclines to the opinion that children would be infantiae proximi during the year next after they ceased to be infantes, and pubertati proximi during that immediately proceding pubertas.

It would seem that originally a pupillus could perform no legal act without his guardian's auctoritas. The inconvenience which this entailed under the old law, which would not permit its solemn dispositions, mancipatio, in iure cessio, stipulatio, etc. to be made by agents, led to a relaxation of the rule so far as to allow an impubes who was pubertati proximus to act for himself in all transactions whereby he could not be pecuniarily prejudiced (Bk. i. 21 pr. and notes supr.); and eventually by the 'benignior iuris interpretatio' referred to in the text the same privilege was extended to all pupilli after attaining their seventh year. Consequently, any pupillus above that age could perform any and every legal act with his guardian's auctoritas: without it he could only 'meliorem suam condicionem facere', and so could be promisee, but not promisor, in a stipulation: bilateral contracts which he entered into the guardian could either ratify or repudiate, subject to what has been already said on Bk. i. 21 pr. For the liability of an impubes on delict see on Bk. iv. 1. 18 inf.

§ **11.** For the effect of an impossible condition on testamentary dispositions see on Bk. ii. 14. 10 supr. A condition is impossible (1) which cannot and never could have been fulfilled, quia natura impedimento est (absolute physical impossibility), or which contemplates the non-occurrence of the necessary, e. g. si nunquam moriar; or (2) which might have been fulfilled under other circumstances, but now cannot, for the same reason (relative physical impossibility), or (3) the fulfilment of which is impossible not by nature but by law ('ubi omnino condicio iure impleri non potest vel id facere ei non liceat, nullius momenti fore stipulationem, proinde ac si ea condicio, quae natura impossibilis est, inserta esset' Dig. 45. 1. 137. 6), or by positive morality, § 24 inf. A stipulation was regarded as 'pure facta' not only if the condition was necessary by nature (e. g. si digito caelum non attigero), but also if it was necessary in law, Dig. 28. 7. 20 pr.

§ **12.** See note on Tit. 15. 1 supr. It is clear from the text that the pre-

contentiosis hominibus praestabat, forte post tempus tales allegationes opponentibus et non praesentes esse vel se vel adversarios suos contendentibus: ideo nostra constitutio propter celeritatem dirimendarum litium introducta est, quam ad Caesareenses advocatos scripsimus, per quam disposuimus tales scripturas, quae praesto esse partes indicant, omnimodo esse credendas, nisi ipse, qui talibus utitur improbis allegationibus, manifestissimis probationibus vel per scripturam vel per testes idoneos approbaverit in ipso toto die quo conficiebatur instrumentum sese vel adversarium suum in aliis

G. iii. 100. 13 locis esse. **Post mortem suam dari** sibi nemo stipulari poterat, non magis quam post eius mortem a quo stipulabatur. ac ne is, qui in alicuius potestate est, post mortem eius stipulari poterat, quia patris vel domini voce loqui videtur. sed et si quis ita stipuletur, '**pridie quam moriar**' **vel** '**pridie quam morieris dari?**' inutilis erat stipulatio. sed cum, ut iam dictum est, ex consensu contrahentium stipulationes valent, placuit nobis etiam in hunc iuris articulum necessariam inducere emendationem, ut, sive post mortem sive

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sumption there referred to was frequently rebutted by perjured evidence, and it was enacted by Justinian's own constitution (Cod. 8. 38. 14) that if the instrument stated that the parties had met, the evidence required to rebut the presumption of a genuine oral stipulation must be of the most convincing character, and must show that the parties were in different districts (in aliis civitatibus, Cod. loc. cit.) during the whole day upon which the contract was alleged to have been made. Practically the defendant had to prove that he and the plaintiff were so distant from each other that no such contract could possibly have been concluded, and hence it follows that after this enactment stipulations could be made entirely by writing, without the parties meeting at all, if the instrument recited that they had met, and they were 'in eadem civitate'.

§ 13. A stipulation for conveyance to one after one's death is in effect one in favour of one's heir, who is no party to the contract, and for that reason was held invalid; see references on § 4 supr. Justinian's change enabled the obligatio and actio 'a persona heredis incipere' Cod. 4. 11; hence if the deceased stipulated for payment to one of his heirs only, that one alone was benefited; which previously had not been always the case even where he had stipulated for himself *and* the particular heir, which was perfectly allowable (see note last referred to), 'quod dari stipulemur, non posse per nos uni ex heredibus adquiri, sed necesse est, omnibus adquiri: at cum quid fieri stipulemur, etiam unius personam recte comprehendi' Dig. 45. 1. 137. 8.

The repugnance to allowing an obligation 'a persona heredis incipere',

pridie quam morietur stipulator sive promissor stipulatio
concepta est, valeat stipulatio. Item si quis ita stipulatus 14
erat: 'si navis ex Asia venerit, hodie dare spondes?' inutilis
erat stipulatio, quia praepostere concepta est. sed cum Leo
inclitae recordationis in dotibus eandem stipulationem quae
praepostera nuncupatur non esse reiciendam existimavit,
nobis placuit et huic perfectum robur accommodare, ut non
solum in dotibus, sed etiam in omnibus valeat huiusmodi
conceptio stipulationis. Ita autem concepta stipulatio, veluti 15
si Titius dicat '**cum moriar, dare spondes?**' **vel** '**cum mo-** G. iii. 100.
rieris', et apud veteres utilis erat et nunc valet. Item post 16
mortem alterius recte stipulamur. Si scriptum fuerit in 17

Gaius iii. 100 (as where A promises B something after his (A's) death) was perhaps partially due, as is suggested by Ihering, to a desire to prevent evasions of such statutes as the leges Falcidia, Iulia, and Papia Poppaea; see Mr. Poste's note on the passage of Gaius referred to.

§ 14. By Justinian's enactment, Cod. 6. 23. 25, the promise in this so-called praepostera stipulatio became binding at once, but could not be sued upon until after the fulfilment of the condition: 'reprehensionem quam novella constitutio (sc. Leonis) in dotalibus instrumentis sustulisse noscitur, in aliis quoque omnibus tam contractibus quam testamentis tollimus, ut tali exceptione cessante et stipulatio et alii contractus et testatoris voluntas indubitate valeat, exactione videlicet post condicionem vel diem competente.' It is difficult to say whether under this enactment a promisor who paid before the fulfilment of the condition could recover by condictio indebiti after the condition had failed; see on Tit. 15. 4 supr.

§ 15. The reason why a stipulation in the form 'cum moriar (or cum morieris) dari spondes?' had been valid under the old law, as stated by Gaius, iii. 100, was that the obligation was held to entitle the promisee, or bind the promisor, 'in novissimo vitae suae tempore,' and not 'a persona heredis incipere'. One might have thought that the reason why one in the form pridie quam moriar' was void (' quia non potest aliter intellegi pridie quam aliquis morietur quam si mors secuta sit' Gaius l. c.) would have applied equally well here: Gaius himself was sensible of the unreasonableness of the distinction, of which he says 'non pretiosa ratione receptum videtur' ii. 232.

§ 16. A stipulation for performance after the death of a third person is merely ex die, for which see on Tit. 15. 2 supr.

§ 17. See note on Tit. 15. 1 supr. So too Ulpian says 'quod fere novissima parte pactorum ita solet inseri, rogavit Titius, spopondit Maevius, haec verba non tantum pactionis loco accipiuntur, sed etiam stipulationis: ideoque ex stipulatu nascitur actio, nisi contrarium specialiter adprobetur, quod non animo stipulantium hoc factum est, sed tantum paciscentium' Dig. 2. 14. 7. 12.

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instrumento promisisse aliquem, perinde habetur, atque si
18 interrogatione praecedente responsum sit. Quotiens plures res una stipulatione comprehenduntur, si quidem promissor simpliciter respondeat 'dare spondeo', propter omnes tenetur: si vero unam ex his vel quasdam daturum se spoponderit, obligatio in his pro quibus spoponderit contrahitur. ex pluribus enim stipulationibus una vel quaedam videntur esse perfectae: singulas enim res stipulari et ad singulas re-
19 spondere debemus. Alteri stipulari, ut supra dictum est, nemo potest: inventae sunt enim huiusmodi obligationes ad hoc, ut unusquisque sibi adquirat quod sua interest: ceterum si alii detur, nihil interest stipulatoris. plane si quis velit hoc facere, poenam stipulari conveniet, ut, nisi ita factum sit, ut comprehensum esset, committetur poenae stipulatio etiam ei cuius nihil interest: poenam enim cum stipulatur quis, non illud inspicitur, quid intersit eius, sed quae sit quantitas in condicione stipulationis. ergo si quis stipuletur Titio dari, nihil agit, sed si addiderit de poena 'nisi dederis,
20 tot aureos dare spondes?' tunc committitur stipulatio. Sed et si quis stipuletur alii, cum eius interesset, placuit stipulationem valere. nam si is, qui pupilli tutelam administrare coeperat, cessit administratione contutori suo et stipulatus est rem pupilli salvam fore, quoniam interest stipulatoris fieri quod stipulatus est, cum obligatus futurus esset pupillo, si male res gesserit, tenet obligatio. ergo et si quis procuratori suo dari stipulatus sit, stipulatio vires habebit. et si creditori suo quod sua interest, ne forte vel poena committatur vel praedia distrahantur quae pignori data erant,
21 valet stipulatio. Versa vice qui alium facturum promisit, videtur in ea esse causa, ut non teneatur, nisi poenam ipse
22 promiserit. Item nemo rem suam futuram in eum casum quo

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§ **19**. See on § 4 supr.

§ **20**. See the note last referred to: and for the liability of tutor honorarius note on 1. 24. 1 supr. A guardian 'qui administrare tutelam nondum coeperat' would be just as liable as one who had for the faults of the colleague who acted, Dig. 26. 7. 55 pr.

§ **21**. See on § 3 supr.

§ **22**. For a man to stipulate for conveyance to him, when he has become its owner, of property which will be his hereafter, is the same

sua fit utiliter stipulatur. Si de alia re stipulator senserit, de 23
alia promissor, perinde nulla contrahitur obligatio, ac si ad interrogatum responsum non esset, veluti si hominem Stichum a te stipulatus quis fuerit, tu de Pamphilo senseris, quem

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thing in effect as to stipulate for a res which is already sua, for which see on § 2 supr.

§ **23**. The two chief varieties of mistake have been distinguished on Bk. ii. 20. 29 supr. To say of contracts that they are void by reason of mistake in the expression of intention is incorrect: they are void, if at all, because one states that one intends what one does not really intend, though it is true that, had it not been for a mistake, this statement would never have been made. It is not, however, enough to nullify a disposition that a mistake has caused a declaration which was not really intended: the expressed intention must have been unintended either altogether, or at least in an essential portion: and this is the true meaning of the dictum that 'essential error alone is a ground of nullity'. By essential error, in this sense, is to be understood error as to either (*a*) the nature of the legal relation or right to be produced: 'non satis autem est dantis esse nummos et fieri accipientis, ut obligatio nascatur, sed etiam hoc animo dari et accipi, ut obligatio constituatur; itaque si quis pecuniam suam donandi causa dederit mihi, quamquam et donantis fuerit et mea fiat, tamen non obligabor ei, quia non hoc inter nos actum est' Dig. 44. 7. 3. 1: or (*b*) the person in relation to whom the intention is declared, provided this is material, Dig. 28. 5. 9 pr.: or (*c*) the thing in relation to which the intention is declared (e. g. the text before us, and Dig. 28. 5. 9. 1; 30. 4 pr.; 45. 1. 137. 1): or (*d*) the properties, i. e. quality, of that thing; as to which the rule extracted by Savigny in respect of sale from the cases is that 'the error avoids the contract when the difference in quality between the thing bought, and that which the purchaser intended to buy, is such, according to commercial usage, as to put the one in a different category of merchandise from the other', System §§ 137, 138: for illustrations see the writer's Contract of Sale in the Civil Law, pp. 55, 56. Conversely, error as a rule is non-essential, and does not affect the validity of the disposition, which relates to the properties or name (Bk. ii. 20. 29 supr., Cod. 6. 23. 4) of the person to whom the declaration of intention relates, or to the name or non-essential properties of the thing, Dig. 30. 4 pr., 34. 5. 28, Cod. 6. 37. 7. 1.

In contracts mistake frequently leads to one party expressing an intention which does not agree with that expressed by the other, because the first supposes the second's real intention to be different from that which he has expressed (e. g. B offers to buy A's black horse, meaning black horse α; A thinks he means black horse β, and agrees to sell: he thinks he is agreeing to B's proposal, but in fact he is agreeing to a proposal which B has never made). Hence there is no consent, for 'non videntur qui errant consentire' Dig. 50. 17. 116. 2, and an essential element of contract is 'duorum pluriumve *in idem* placitum et consensus' Dig.

24 Stichum vocari credideris. Quod turpi ex causa promissum est, veluti si quis homicidium vel sacrilegium se facturum promittat, non valet.

25 Cum quis sub aliqua condicione fuerit stipulatus, licet ante condicionem decesserit, postea existente condicione heres eius
26 agere potest. idem est et a promissoris parte. Qui hoc anno aut hoc mense dari stipulatus sit, nisi omnibus partibus prae-

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2. 14. 1. 2. In such cases the contract is void only if the mistake (i. e. the absence of consent) is essential in the sense already stated (nature of the relation, Dig. 12. 1. 18: person, ib. 32: thing, 18. 1. 9 pr.: its properties, ib. 2).

Error in the formation of intention (or in motive) does not necessarily avoid dispositions. Because one is induced to act by a mistake in motive, the intention is none the less real; or, in other words, unessential error, as a rule, leaves the disposition valid, however strongly it may have operated as an inducement. The chief exception to this is in testamentary dispositions (Bk. ii. 20. 31 and note supr.): dispositions inter vivos are invalidated by such mistake only if the latter was known to the party benefited by them, and this approximates to fraud. If actual fraud on the other's part produces the mistake, the disposition is not ipso facto void; but if sued upon the exceptio doli can be pleaded, or the party deceived can claim by the actio doli to be restored in statum quo.

§ 24. Cf. Dig. 45. 1. 26 'generaliter novimus, turpes stipulationes nullius esse momenti', 12. 5. 8 'si ob turpem causam promiseris Titio . . . si petat, exceptione doli mali summovere eum possis', Cod. 8. 38. 4 'cum omnia, quae contra bonos mores vel in pactum vel in stipulationem deducuntur, nullius momenti sint'. Unlawful or immoral conditions were treated in the same way as those which were impossible: they avoided contracts: in testamentary dispositions they were taken 'pro non scriptis' Dig. 28. 7. 9; ib. 14.

§ 26. If no time was fixed, either expressly or by implication, for performance, the creditor was entitled to demand it at once: as may be gathered from § 27, the debtor could claim only so much grace as was required by the very nature of the act to be performed: cf. Dig. 50. 17. 186. Nor, as a rule, was he entitled to receive a demand of performance from the creditor, though he did not usually incur the penalties of mora until such demand (interpellatio) had been made: 'mora fieri intellegitur non ex re, sed ex persona, id est, si interpellatus opportuno loco non solverit, quod apud iudicem examinabitur. Nam, ut Pomponius scripsit, difficilis est huius rei definitio' Dig. 22. 1. 32 pr.: cf. Paul. Sent. Rec. 3. 8. 4. Such demand, however, was dispensed with (1) when a time was fixed for performance in the sense that the debtor must perform then, not merely that the creditor might not demand performance earlier. This is the true Roman sense of the maxim 'dies interpellat pro homine', not that interpellatio was always unnecessary if a time for performance

teritis anni vel mensis non recte petet. Si fundum dari 27
stipuleris vel hominem, non poteris continuo agere, nisi tantum spatii praeterierit, quo traditio fieri possit.

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was agreed upon, though it is stated that this interpretation has been almost universally adopted in the practice of the modern civil law. (2) Where the creditor was a minor, Dig. 31. 87. 1. (3) Where the obligation was to give up property of which the creditor had been deprived by a delict, Dig. 13. 1. 8. 1; ib. 20; 43. 16. 19. (4) In cases of bequests to churches and charitable foundations. Where demand was impossible owing to the absence of the debtor or some other cause a declaration might be made in lieu of it before a judge, Dig. 22. 2. 2.

The mere fact that a debtor has not performed what is due from him does not, as a rule, affect his liability: it does so only in virtue of specific provision in a contract or will (as where it is agreed that the promisor, or directed that the heir, shall incur a penalty unless he performs within a prescribed time) or by law (as where interest is due by statute). In these exceptional cases the commentators speak of objective mora. But any debtor or any creditor may become guilty of mora in the narrower sense (so-called subjective mora) by conduct of his own: mora in that sense being the wrongful refusal to perform an act, whether mora debitoris or solvendi, refusal to perform, or mora creditoris or accipiendi, refusal to accept performance when due and properly tendered.

Mora debitoris exists only under the following conditions: (1) the debtor's obligation must be valid and actionable, and he must not be able to meet his creditor by any exceptio. (2) The time at which he was bound to perform must have passed without performance. (3) He must know that he is bound to perform at the time and in the manner required, or (as Mr. Poste puts it) a further condition of mora is the absence of all doubt and dispute, at least of all dispute that is not frivolous and vexatious, as to the existence and amount of the debt: 'qui sine dolo malo ad iudicium provocat, non videtur moram facere' Dig. 50. 17. 63, 'et hic moram videtur fecisse, qui [dolo, sc.] litigare maluit quam restituere' Dig. 45. 1. 82. 1. (4) He must have no other ground of justification for his default, this being a question for the court, 'esse enim hanc quaestionem de bono et aequo' Dig. 45. 1. 91. 3: e. g. impossibility (see on § 1 supr.). Whether innocent insolvency was such a ground is disputed.

The principal consequences of mora debitoris are as follow:

(1) The debtor must compensate the creditor for the loss of all advantage which he would have had if the act had been duly performed (omnis causa), especially fruits, Dig. 22. 1. 38. 15, and interest, ib. 32. 2. If, however, the obligation was to pay certa pecunia, interest on mora could not be claimed: see on Tit. 14 pr. supr. (2) After he is once in mora, the debtor is not released by performance becoming impossible, even without his fault, Dig. 12. 1. 5; in other words, even though under the contract he was liable for culpa lata only, he now becomes answerable not only for culpa levis but also for casus: and if the object of the obligation

XX

DE FIDEIUSSORIBUS

G. iii. 115. **Pro eo qui promittit solent alii obligari, qui fideiussores appellantur,** quos homines accipere solent, dum curant, ut

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has become less valuable, he must pay the highest value it has had since it became due, Dig. 13. 3. 3. (3) In contracts generating bilateral obligation the one party can withdraw from the compact, if to accept performance after mora of the other would seriously prejudice him: e. g. if possession of a farm is not given to the lessee at the date agreed upon, and in the meanwhile he has taken another, Dig. 19. 2. 24. 4. (4) If it has been agreed that the creditor's right shall expire within a certain period, mora debitoris occurring within that period cancels the agreement, Dig. 34. 3. 3. 1 and 2.

Mora debitoris was 'purged' by extinction of the obligation, by the creditor's either expressly or tacitly granting him grace, and by the latter tendering performance to the former, including compensation for all loss which the mora had entailed upon him.

The chief effects of mora creditoris were (1) that the debtor was released by performance becoming impossible save through his own dolus or culpa lata, Dig. 18. 6. 16 and 18; in other words, he became answerable for culpa lata only, even though previously answerable for culpa levis; (2) that the creditor has to compensate the debtor for any loss which the refusal to accept performance properly tendered entails upon him, Dig. 19. 1. 3. 4.

Tit. XX. Under the older law suretyship could be contracted 'verbis' in two other ways, sponsio (spondes? spondeo) and fidepromissio (fidepromittis? fidepromitto); but only debts incurred by stipulation could be guaranteed by either of them. No one could be a sponsor except a civis, and unless both the parties to the principal contract were cives also, but these rules did not apply to fidepromissio. Both were obsolete under Justinian, but the following points in which they differed from fideiussio may be noticed:

(1) The obligation of sponsors and fidepromissors did not descend to their heirs, Gaius iii. 120. (2) By a lex Publilia of uncertain date a sponsor who paid the debt could, unless repaid by the principal within six months, recover twice the amount by actio depensi, Gaius iv. 22. (3) The lex Furia de sponsu limited the liability of sponsors and fidepromissors to two years from the date of their contract, and also (4) where there were two or more of them, divided the liability among all who were living at the time when the guarantee could be enforced, so that each could be sued for only an aliquot share, Gaius iii. 121. (5) The lex Apuleia, extending also to the provinces, conferred a less but similar boon on sponsors and fidepromissors even outside Italy, by giving to any one of them who paid the whole debt an actio pro socio against the rest, by which he could recover what he had paid in excess of his fair share, Gaius iii. 122. The

diligentius sibi cautum sit. In **omnibus** autem **obligationibus** 1 G.iii.119[a].
adsumi possunt, **id est sive re sive verbis sive litteris sive consensu contractae fuerint. ac ne illud quidem interest, utrum civilis an naturalis sit obligatio, cui adiciatur** fideiussor, **adeo quidem, ut pro servo quoque obligetur, sive extraneus sit qui fideiussorem a servo accipiat, sive ipse dominus in id quod sibi** naturaliter **debetur.** Fideiussor non tantum ipse 2 Cf. G.iii.120.
obligatur, sed etiam heredem obligatum relinquit. Fideiussor 3

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exact dates of these laws are uncertain. Gaius says (iii. 122) that the lex Apuleia was the earlier of the two, and this could not have been enacted before Sicily became a province in B. C. 241. On the other hand, the lex Furia, which (Gaius iv. 22) created a manus iniectio pro iudicato, may be conjectured to have been earlier than the lex Vallia (Gaius iv. 25), which itself preceded the lex Aebutia : hence it cannot well have been enacted later than about B. C. 150. (6) A lex Cicereia, Gaius iii. 123, enacted probably between the lex Furia and the lex Cornelia, provided that a creditor, on taking sponsors or fidepromissors, should first state openly what the debt to be guaranteed was, and also the number of sureties he was going to take; if this were not done, they could by taking action within thirty days procure their release. Gaius says that this enactment had by usage been extended to fideiussors also, but it was obsolete under Justinian.

Fideiussio, like sponsio and fidepromissio, is a form of what is called cumulative intercession, which may be defined as a contract between a creditor and a third person by which the latter takes upon himself the debtor's obligation without the debtor being himself released. The form in which fideiussio was contracted was 'idem fide tua esse iubes? fideiubeo' (Gaius iii. 116), so that the obligation of the principal and surety was correal : the Greek equivalents are given in § 7 inf.

§ 1. It was not necessary, as might possibly be inferred from the text, that the guaranteed obligation should arise ex contractu : it might arise from delict (though this was perhaps not always so; 'ex delicto *magis* putamus teneri' Dig. 46. 1. 8. 5), judgment, quasi ex contractu, or any other source ; but there must be an obligatio, even though it be naturalis only, and that obligatio must be another person's : so that if the principal obligation is or becomes void, the fideiussio is or becomes void likewise, Dig. 46. 1. 47 pr., ib. 56 pr. A curious exception to this had existed in the older forms of suretyship ; for if A promised payment after his own death, the promise would be void, Tit. 19. 13 supr., but a sponsor or fidepromissor to it would be liable, though it had been a question whether he would be bound for the sponsio of a slave or peregrinus, which would be void also, Gaius iii. 119.

§ 3. By saying that a fideiussor 'praecedere obligationem potest' is meant only that a man may on the occurrence of some event in the future become fideiussor nolens volens, not that he is bound before the

4 et praecedere obligationem et sequi potest. Si plures sint
G. iii. 121. fideiussores, **quotquot erunt numero, singuli in solidum te-
nentur. itaque liberum est creditori a quo velit solidum
petere. sed ex epistula divi Hadriani compellitur creditor a
singulis, qui modo solvendo sint** litis contestatae tempore,
partes petere. ideoque si quis **ex fideiussoribus** eo tempore
solvendo non **sit,** hoc **ceteros** onerat. sed et **si ab uno**
G. iii. 122. fideiussore creditor **totum consecutus fuerit, huius solius de-
trimentum erit, si is pro quo fideiussit solvendo non sit:** et
sibi imputare debet, cum **potuerit** adiuvari **ex epistula divi
Hadriani** et **desiderare, ut pro parte in se detur actio.** Fideius-

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principal debtor is. If the contract were in the form 'id quod mihi A debebit, fide tua esse iubes?' the promisor was not bound at once; but if A subsequently became the promisee's debtor, then the fideiussor was bound; the promise was in effect made subject to a suspensive condition: for the legal position in such cases see on Tit. 15. 4 supr.; cf § 5 inf.

§ 4. Two or more fideiussors never enjoyed the benefits of the leges Apuleia and Furia; any one of them was liable to be sued for the whole debt, and if so sued must pay the whole of it. Under the so-called beneficium divisionis, which was introduced by the epistola Hadriani, he was enabled, when sued, to demand that if the other fideiussors were solvent the creditor should divide his claim between him and them, this demand taking the form of an exceptio to the plaintiff's contention: 'si contendat fideiussor caeteros solvendo esse, etiam exceptionem ei dandam, "si non et illi solvendo sint"' Dig. 46. 1. 28; so that on the general rule, the burden of proving their solvency lay on the defendant. Thus he was not in so favourable a position as the sponsor and fidepromissor under the two statutes referred to; for the liability was not divided between him and the other fideiussors ipso iure, so that he would still have to pay the whole debt if (under the formulary procedure) he neglected to get the exceptio inserted in the formula of the action, or if all the others were insolvent; in other words, his liability was affected by the insolvency of the rest, that of a sponsor or fidepromissor (at any rate in Italy) was not.

If one fideiussor paid the whole debt, he still had a remedy against the others which Justinian does not mention; he could demand, before payment, that the creditor should assign to him all rights which he had against them no less than against the principal debtor (beneficium cedendarum actionum). Such demand after payment was useless, for the debt was then discharged, and the rights of action, being extinguished, could no longer be assigned; but if made before payment it had the effect of preserving them, for 'pretium magis mandatarum actionum solutum quam actio, quae fuit, perempta videtur' Dig. 46. 3. 76. As

sores **ita obligari non possunt, ut plus debeant, quam debet** 5 G. iii. 126.
is pro quo obligantur: nam eorum obligatio accessio est principalis obligationis nec plus in accessione esse potest quam in principali re. at ex diverso, ut minus debeant, obligari Cf. G. iii. 113.
possunt. itaque si reus decem aureos promiserit, fideiussor in quinque recte obligatur: contra vero non potest obligari. item si ille pure promiserit, fideiussor sub condicione promittere potest: contra vero non potest. non solum enim in quantitate, sed etiam in tempore minus et plus intellegitur. plus est enim statim aliquid dare, minus est post tempus dare.
Si quid autem fideiussor **pro reo solverit, eius reciperandi** 6 G. iii. 127.
causa habet cum eo mandati iudicium. Graece fideiussor 7
plerumque ita accipitur: τῇ ἐμῇ πίστει κελεύω, λέγω, θέλω sive

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against the principal debtor the cessio carried with it all accessory rights, such as mortgages.

§ 5. The meaning of plus and minus in this kind of connection may be illustrated by reference to the doctrine of plus petitio, Gaius iv. 53, 54, Bk. iv. 6. 33 inf. A somewhat complicated case is that where it cannot be ascertained whether the fideiussor has promised 'more' than the other until afterwards; e. g. where the principal promises subject to the fulfilment of a condition, and the surety promises subject to the fulfilment of either the same condition or another; if the common condition is fulfilled first, he is not bound 'in duriorem causam'; if the other, he is. It seems to be the better opinion that the whole promise is void ab initio.

§ 6. Independently of the beneficium cedendarum actionum, a surety who paid was generally regarded as the agent of the principal debtor, and could recover from him the amount which he had paid, and all incidental expenses, by actio mandati (or actio negotiorum gestorum 'si pro absente fideiusserit' Dig. 17. 1. 20. 1); he could do this even when as a fact he had not paid at all, if the creditor had given him a release donandi animo, Dig. 17. 1. 10. 13. Where, however, the debt was practically his own (e. g. Dig. 2. 14. 24; 2. 8. 8. 1), or he had become surety with the intention, not of binding the principal, but of doing him a gratuitous service (Dig. 14. 6. 9. 3; 17. 1. 6. 2), this ius regressus did not exist. By Nov. 4. 1 Justinian gave to fideiussors the so-called beneficium ordinis or excussionis, entitling the surety to demand that the creditor should sue the principal debtor before resorting to him, unless the debtor resided in a different jurisdiction; in which case, unless the surety produced him within a time fixed by the judge, he could be sued himself.

The modes in which a fideiussor's liability was terminated are

(1) Extinction of the principal debt in any of the modes enumerated in Tit. 29 and notes inf., Dig. 46. 3. 43; 12. 2. 28. 1; 34. 3. 5 pr. It is only under very exceptional circumstances that the surety remains bound after

βούλομαι: sed et si *φημί* dixerit, pro eo erit, ac si dixerit *λέγω*.
8 In stipulationibus fideiussorum sciendum est generaliter hoc

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the principal obligation has ceased to exist. Even where he himself had brought about its extinction by rendering its performance impossible, the jurists at first were unable to admit the continuance of his own liability ex contractu, though they held him liable to the actio de dolo, Dig. 4. 3. 19: but later a utilis actio ex stipulatu was allowed in lieu of this, which eventually became directa: in other words, the continuing liability was recognised. So too if the principal debtor died, leaving no successor, the surety remained bound, Dig. 46. 3. 95. 3. If the creditor was unable to sue the principal with any effect, because, though the obligatio was not extinguished, the latter could always repel him by an exceptio, the surety was usually able to use that exceptio himself, for the reason stated in Bk. iv. 14. 4 inf. Among the defences of this class which he could use are exceptio pacti, loc. cit.: 'exceptio iuris iurandi' Dig. 12. 2. 28. 1, and the plea of limitation. The following exceptiones, however, though open to the debtor, were not also open to the surety: (*a*) those which were purely personal to the former, Dig. 44. 1. 7 pr.; e. g. 'beneficii competentiae' Dig. loc. cit., 'pacti de non petendo in personam' Dig. 2. 14. 22, 'nisi bonis cesserit' Bk. iv. 14. 4 inf.: the last for the very reason that 'is qui alios pro debitore obligat hoc maxime prospicit, ut cum facultatibus lapsus fuerit debitor, possit ab iis, quos pro eo obligavit, suum consequi': the very end of suretyship would otherwise be defeated. Similarly, if the principal debtor was a minor, and could plead that he had been in integrum restitutus, the fideiussor was not benefited if the creditor had taken him for the express purpose of protecting himself against this eventuality, Dig. 4. 4. 13 pr. (*b*) Such exceptions as left a naturalis obligatio still subsisting, e. g. that SC[i] Macedoniani, unless the surety had regressus against the principal debtor, Dig. 14. 6. 9. 3.

(2) Confusio, or concurrence of the main and accessory liability in the same person: 'generaliter Iulianus ait eum, qui heres extitit ei pro quo intervenerat, liberari ex causa accessionis et solummodo quasi heredem rei teneri' Dig. 46. 1. 5.

(3) If the principal debtor fraudulently evaded his obligation, or squandered his means, the fideiussor could demand his release, Dig. 17. 1. 38. 1, Cod. 4. 35. 10.

§ 8. Cf. Tit. 19. 17 supr.

Besides fideiussio, which was a formal contract, the Roman law of Justinian recognised two other modes in which the relation of suretyship could be produced: the one a consensual contract (the so-called mandatum qualificatum, for which see Tit. 26. 5 and notes, inf.), the other a mere pact, viz. constitutum debiti alieni.

Constitutum is a formless promise to discharge an already subsisting obligation, whether it be one's own (const. debiti sui) or some one's else (const. debiti alieni); Bk. iv. 6. 9 inf. The first case was undoubtedly the earlier: the debtor, exposed to a condictio certae pecuniae, promises to pay on a fixed day in order to obtain a delay, and this fixing of a date

accipi, ut, quodcumque scriptum sit quasi actum, videatur etiam actum: ideoque constat, si quis se scripserit fideiussisse, videri omnia sollemniter acta.

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was at first essential; later it was unnecessary, though in its absence Justinian allowed a delay of ten days: Girard, 4th ed. p. 601, note 5. In itself it did not belong to any recognised class of contracts, and therefore did not give rise to a civil obligation: it was made actionable by the praetor, because, according to Theophilus, the want of a remedy on this class of promises led not only to fraud but to great hardship: see Hunter's Roman Law, p. 386. Usually the promise was to pay on a day certain; but if this was not so, the promisor was entitled to ten days' grace, Dig. 13. 5. 21. 1.

Constitutum debiti alieni resembles fideiussio in presupposing an actual even though only 'natural' liability of another person, Dig. 13. 5. 1. 1; ib. 6–8; in the right of two or more constituentes to the beneficium divisionis, Cod. 4. 18. 3: in the surety's right to the beneficium ordinis, Nov. 4. 1 (at any rate in those cases where his obligation is exactly co-extensive with that of the principal debtor, and its object is merely the creditor's security), and as a rule to use such exceptiones of the principal debtor as practically, though not formally, annihilate the creditor's right against him. But while the fideiussor is in effect a correus, and the sole end of his liability is the creditor's security, constitutum was often designed to confer on the latter further advantages: the obligation was different from that of the principal debtor, and solidary rather than correal. Hence the constituens is not prejudiced by the latter's culpa or mora: but, like solidary debtors in general, he is not necessarily released by extinction of the main debt, but only by satisfaction of the creditor, so that (e. g.) he remains liable after the action against the debtor is barred by lapse of time (Dig. 13. 5. 18. 1), or even after the latter has paid one of two correal creditors, with the other of whom he himself made the constitutum, Dig. ib. 10. In respect of time and place of performance he may be bound differently, and even in duriorem causam than the main debtor, ib. 3. 2. Before Justinian a constitutum could be made in relation only to res fungibiles, and the action on it was barred in an annus utilis; both of these limitations he abolished, and also the old penal wager in the action of half the value in dispute (Gaius iv. 171), Cod. 4. 18. 1; so that under his system a constituens might be bound for a different object of equal value with that for which the principal debtor was liable; if it was of greater value, he was not answerable for the excess.

One of the salient features of the Roman law of suretyship is the practical incapacity of women to bind themselves by contracts of this kind. It seems to have originated in edicts of Augustus and Claudius, prohibiting wives from becoming sureties for their husbands, Dig. 16. 1. 2 pr. It is supposed, with considerable probability, that the cause of the more general enactment, the SC. Velleianum, A. D. 46, was the recklessness with which women, after Claudius had abolished the tutela legitima of agnates over them (p. 149 supr.), exercised their newly-found control of their property on behalf of others. This enacted that no action should lie on contracts of

XXI

DE LITTERARUM OBLIGATIONE

Cf. G. iii. 128. Olim scriptura fiebat **obligatio**, quae **nominibus** fieri dicebatur, quae nomina hodie non sunt in usu. plane si quis

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suretyship entered into by women as promisors ; 'quod ad fideiussiones et mutui dationes pro aliis pro quibus intercesserint feminae pertinet, tametsi ante videtur ita ius dictum esse, ne eo nomine ab his petitio neve in eas actio detur, cum eas virilibus officiis fungi et eius generis obligationibus obstringi non sit aequum ; arbitrari senatum, recte atque ordine facturos ad quos de ea re in iure aditum erit, si dederint operam ut in ea re senatus voluntas servetur' Dig. 16. 1. 2. 1. The senatusconsult thus related only to fideiussio and mutuum ; but its principle was extended to all forms of intercessio, privative as well as cumulative, by responsa of the jurists and imperial enactments, Dig. loc. cit. 1 pr., ib. 2. 4. Though it had refused a remedy on such contracts, it would seem that the usual practice was for the praetor to grant the action, if applied for, which could then be met by the exceptio SC[i] Velleiani, frequently mentioned in the texts, which could be pleaded against execution even after judgment had been given, Dig. 14. 6. 11. It must not, however, be inferred from this that the woman incurred even a 'natural' obligation to pay the debt ; for if she paid in ignorance of her right to the exceptio, she could recover by condictio indebiti, Dig. 12. 6. 40 pr. Another view as to the history of the matter, in some degree supported by the terms of the senatusconsult, is that women had been forbidden to become sureties even by the old civil law, and that the enactments of the time of Augustus and Claudius are merely evidence of its evasion through the rapid decay of old Roman manners at the close of the Republic.

There are a number of exceptions from the operation of the senatusconsult, as e. g. where the woman had been guilty of dolus towards the creditor, Dig. 16. 1. 2. 3, ib. 30 pr., and where the latter, through no fault of his own, was not aware that the person 'interceding' was a woman, ib. 4 pr. : ib. 6 : ib. 11 ; where the intercessio was made for valuable consideration, Cod. 4. 29. 23 pr. ; where the creditor was a minor and the principal debtor insolvent, Dig. 4. 4. 12 : where the obligation guaranteed was to provide a dos, Cod. 4. 29. 12 and 25 ; and where in order to obtain the guardianship over her children she had renounced the benefit of the enactment (p. 147 supr.).

Justinian enacted (1) that all intercession by a woman should be absolutely void unless expressed in a public document attested by at least three witnesses, Cod. 4. 29. 23. 2, and that even where this form was observed she might plead the exceptio ; the exceptions which had previously held were still recognised, if this form was observed, though its necessity was dispensed with where the intercessio was made for valuable consideration, or in the matter of a dos, Cod. loc. cit. 24. 25. (2) That all intercession by a wife on behalf of her husband, with a few exceptions, should be void, even though the form prescribed in other cases were complied with, Nov. 134. 8.

debere se scripserit, quod numeratum ei non est, de pecunia minime numerata post multum temporis exceptionem opponere non potest: hoc enim saepissime constitutum est. sic fit, ut et hodie, dum queri non potest, scriptura obligetur: et ex ea nascitur condictio, cessante scilicet verborum obligatione. multum autem tempus in hac exceptione antea quidem ex principalibus constitutionibus usque ad quinquennium procedebat: sed ne creditores diutius possint suis pecuniis forsitan defraudari, per constitutionem nostram tempus coartatum est, ut ultra biennii metas huiusmodi exceptio minime extendatur.

XXII

DE CONSENSU OBLIGATIONE

Consensu fiunt obligationes in emptionibus venditionibus, G. iii. 135.
locationibus conductionibus, societatibus, mandatis. Ideo 1
autem istis modis consensu dicitur obligatio contrahi, quia G. iii. 136.
neque scriptura neque praesentia omnimodo opus est, ac ne dari quidquam necesse est, ut substantiam capiat obligatio,
sed sufficit eos qui negotium gerunt consentire. Unde inter 2
absentes quoque talia negotia contrahuntur, veluti per epistulam aut per nuntium. Item in his contractibus alter alteri 3
obligatur in id, quod alterum alteri ex bono et aequo praestare G. iii. 137.
oportet, cum alioquin in verborum obligationibus alius stipuletur, alius promittat.

XXIII

DE EMPTIONE ET VENDITIONE

Emptio et venditio contrahitur, simulatque **de pretio** G. iii. 139.
convenerit, quamvis nondum pretium numeratum sit ac ne

Tit. XXI. Upon the subject of literal contract in general see Excursus VIII, at the end of this Book.

Tit. XXIII. Before Justinian, as is stated in the text, following Gaius iii. 139, arra or earnest money had been given mainly for the purpose of evidence: 'quod saepe arrae nomine datur, non eo pertinet, quod sine arra conventio nihil proficiat. sed ut evidentius probari possit convenisse de pretio' Dig. 18. 1. 35 pr. By Cod. 4. 21. 17. 2 Justinian made it the measure of a penalty to be paid (additional, in unwritten contracts of sale, to damages as assessed by the judge) by the party who refused to execute. Dr. Hunter (Roman

arra quidem data fuerit. nam quod arrae nomine datur, argumentum est emptionis et venditionis contractae. sed haec quidem de emptionibus et venditionibus, quae sine scriptura consistunt, optinere oportet: nam nihil a nobis in huiusmodi venditionibus innovatum est. in his autem quae scriptura conficiuntur non aliter perfectam esse emptionem et venditionem constituimus, nisi et instrumenta emptionis fuerint conscripta vel manu propria contrahentium, vel ab alio quidem scripta, a contrahente autem subscripta et, si per tabellionem fiunt, nisi et completiones acceperint et fuerint partibus absoluta. donec enim aliquid ex his deest, et poenitentiae locus est et potest emptor vel venditor sine poena recedere ab emptione. ita tamen impune recedere eis concedimus, nisi iam arrarum nomine aliquid fuerit datum: hoc etenim subsecuto, sive in scriptis sive sine scriptis venditio celebrata est, is qui recusat adimplere contractum, si quidem emptor est, perdit quod dedit, si vero venditor, duplum restituere compellitur, licet nihil super arris expressum est.

Law, p. 332) seems clearly to be wrong in supposing that in a sale which the parties had not agreed to reduce to writing the defaulter could escape scot free by forfeiting the arra which he had given, or double that which he had received. He was subject to the ordinary rule, and was bound from the moment the price was agreed upon to do what he had promised. Justinian's other change may be taken to relate either to a contract of sale actually concluded, which the parties had agreed should be reduced to writing: or merely to preliminary negotiations undertaken with a view to a sale. The latter view is the more probable: 'the arra spoken of is not given as evidence that a contract has been concluded: it is the so-called arra contractu imperfecto data, and the case contemplated is where there are negotiations pending for a sale: the intending purchaser gives earnest, and it is agreed that the contract, if it comes off, shall be reduced to writing and signed by the parties. Justinian then gave no new right to either party of withdrawing from a *contract*, for in the case supposed there is merely a refusal to complete a bargain which so far has not advanced beyond the stage of pourparlers. All that was new in his enactment was that if arra had been given by the would-be purchaser in the course of such pourparlers, and he backed out of them, he should forfeit it, while, if it was the intending vendor, he should have to return it and its value besides, whether there had been an agreement to that effect or not. Previously this had been so only when expressly so agreed': Moyle, Contract of Sale in the Civil Law, p. 43: cf. Girard, 4th ed. pp. 541, 542. The words at the end of the § (sive sine scriptis)

Pretium autem constitui oportet: nam nulla emptio sine pretio esse potest. sed et **certum pretium esse debet. alioquin si ita inter aliquos convenerit, ut, quanti Titius rem aestimaverit, tanti sit empta:** inter veteres satis abundeque hoc dubitabatur, sive constat venditio sive non. sed nostra decisio ita hoc constituit, ut, quotiens sic composita sit venditio 'quanti ille aestimaverit', sub hac condicione staret contractus, ut, si quidem ipse qui nominatus est pretium definierit, omnimodo secundum eius aestimationem et pretium persolvatur et res tradatur, ut venditio ad effectum perducatur, emptore quidem ex empto actione, venditore autem ex vendito agente. sin autem ille qui nominatus est vel noluerit vel non potuerit pretium definire, tunc pro nihilo esse venditionem quasi nullo pretio statuto. quod ius cum in venditionibus nobis placuit, non est absurdum et in locationibus et conductionibus trahere. **Item pretium in numerata pecunia consistere debet. nam in ceteris rebus an pretium**

1 G.iii.140.
2 G.iii.141.

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are inconsistent with the statement above that Justinian had made no change in sales 'quae sine scriptura consistunt'.

§ 1. The price need not be absolutely fixed: e. g. it was sufficient to promise 'quantum pretii in arca habebo' Dig. 18. 1. 7. 1. The view confirmed by Justinian (Cod. 4. 38. 15), as to the validity of a sale in which the fixing of a price had been left to a third person, had been that of Proculus; Labeo held such a transaction void, Gaius iii. 140. If either of the parties to the contract was left to fix the price at his own absolute discretion it was void, Dig. 18. 1. 35. 1, Cod. 4. 38. 13. Nor must the price be illusory or merely nominal, else the transaction is a gift, and not a sale, Dig. 18. 1. 36, though this was not so if one sold at a less price than one could have got in the market from motives of kindness or friendship: 'si quis donationis causa minoris vendat, venditio valet' Dig. 18. 1. 38.

As regards the fairness or adequacy of the price the general rule was, in the absence of dolus, not to interfere with the freedom of contract, Dig. 19. 2. 22. 3: 4. 4. 16. 4. But by two rescripts of Diocletian, Cod. 4. 44. 2 and 8, if a thing were sold for less than half its real value (laesio enormis) the vendor might rescind the sale unless the vendee would pay as much in addition as would make the price a fair one: 'vel si emptor elegerit quod deest iusto pretio recipias.' Mr. Poste's restriction of the enactment to sales of land seems to be without reason; it speaks of 'res' generally.

§ 2. The lines relied on by the Sabinians are from Iliad vii. 472–5: the 'alii Homerici versus' supporting the received opinion are cited by Paulus in Dig. 18. 1. 1. 1, from Il. vi. 235. The anteriores principes referred to

esse possit, veluti homo aut fundus aut toga alterius rei pretium esse possit, valde quaerebatur. Sabinus et Cassius etiam in alia re putant posse pretium consistere: unde illud est, quod vulgo dicebatur per permutationem rerum emptionem et venditionem contrahi eamque speciem emptionis venditionisque vetustissimam esse: argumentoque utebantur Graeco poeta Homero, qui aliqua parte exercitum Achivorum vinum sibi comparasse ait permutatis quibusdam rebus, his verbis:

ἔνθεν ἄρ' οἰνίζοντο καρηκομόωντες Ἀχαιοί,
ἄλλοι μὲν χαλκῷ, ἄλλοι δ' αἴθωνι σιδήρῳ,
ἄλλοι δὲ ῥινοῖς, ἄλλοι δ' αὐτῇσι βόεσσι,
ἄλλοι δ' ἀνδραπόδεσσι.

Diversae scholae auctores contra sentiebant aliudque esse existimabant permutationem rerum, aliud emptionem et venditionem. alioquin non posse rem expediri permutatis rebus, quae videatur res venisse et quae pretii nomine data esse: nam utramque videri et venisse et pretii nomine datam esse rationem non pati. sed Proculi sententia dicentis permutationem propriam esse speciem contractus a venditione separatam merito praevaluit, cum et ipsa aliis Homericis versibus adiuvatur et validioribus rationibus argumentatur. quod et anteriores divi principes admiserunt et in nostris
3 digestis latius significatur. Cum autem emptio et venditio

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as having confirmed the Proculian view are Diocletian and Maximian, Cod. 4. 64. 7.

It is important to distinguish between sale and exchange (permutatio), for they belong to different classes of contract, and their respective vincula iuris are imposed by different causae. Permutatio is one of the innominate contracts, p. 401 supr.; there is no obligation till one of the two exchanging parties has done what he has promised; but in sale, which is consensual, the obligation is independent of part performance.

It is not, however, necessary that the whole price shall be in money, Dig. 18. 1. 79; 19. 1. 6. 1 and 2; and if, after the contract is concluded, the vendor changes his mind, and agrees to take goods in lieu of the purchase money, it remains sale and does not become exchange, Cod. 4. 44. 9.

§ 3. The property in the res vendita did not pass to the purchaser till it had been delivered to him by the vendor, provided he were owner, who was not bound to do this until he had received the whole price, Bk. ii. 1. 41 supr. Consequently, the rule that, even before delivery, the 'periculum rei' should fall upon the purchaser, and that he alone should suffer from

contracta sit (quod effici diximus, simulatque de pretio convenerit, cum sine scriptura res agitur), periculum rei venditae statim ad emptorem pertinet, tametsi adhuc ea res emptori tradita non sit. itaque si homo mortuus sit vel aliqua parte corporis laesus fuerit, aut aedes totae aut aliqua ex parte incendio consumptae fuerint, aut fundus vi fluminis totus vel aliqua ex parte ablatus sit, sive etiam inundatione aquae aut arboribus turbine deiectis longe minor aut deterior esse coeperit: emptoris damnum est, cui necesse est, licet rem non fuerit nactus, pretium solvere. quidquid enim sine dolo et

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loss, destruction, or even deterioration of the res vendita without the vendor's fault, was an exception from the legal maxim 'res perit domino'. It was only rarely that such loss fell on the vendor; e.g. if the res vendita was not specifically ascertained, or if the sale had been made subject to a suspensive and yet unfulfilled condition. But though not answerable for casus, the vendor was bound, until traditio, to show in the case of the thing sold the diligentia of a bonus paterfamilias (Excursus VI inf.): 'custodiam autem venditor talem praestare debet quam praestant hi quibus res commodata est, ut diligentiam praestet exactiorem quam in suis rebus adhiberet' Dig. 18. 6. 3. The effect of his expressly undertaking the custodia seems to have been to make him liable, apart from any negligence, if the property was stolen, or if a slave who was sold ran away before delivery, but not for mere accident or other events beyond his control.

The vendor was not bound to make the vendee owner of the res tradita, but only to give free and undisturbed possession: in other words, a possessor could validly sell that which he possessed, and the purchaser could not claim to rescind the contract, or contend that there never was a contract at all, simply because the other party turned out not to have been owner of the thing sold: 'et imprimis ipsam rem praestare venditorem oportet, id est, tradere; quae res, si quidem dominus fuit venditor, facit et emptorem dominum, si non fuit, tantum evictionis nomine venditorem obligat, si modo pretium est numeratum aut eo nomine satisfactum. Emptor autem nummos venditoris facere cogitur' Dig. 19. 1. 11. 2, 'verum est venditorem hactenus teneri, ut rem emptori habere liceat, non etiam ut eius fiat' ib. 30. 1, 'qui vendidit, necesse non habet, fundum emptoris facere, ut cogitur, qui fundum stipulanti spopondit' Dig. 18. 1. 25. 2; in permutatio the rule was different, Dig. 19. 4. 1. 3. Dr. Hunter (Roman Law, p. 320) accounts for this peculiar rule of the Roman law of sale by saying 'if the seller had been bound to make a good title, then aliens (peregrini) could neither have bought nor sold, for they could not be owners (domini ex iure Quiritium). But aliens could "possess", and therefore an obligation to deliver possession, combined with warranty against eviction, gave them as complete rights as it was possible they could have in Roman law'. But this fails to explain how they could be purchasers; for if they could not own the res vendita, neither could they own the money with

culpa venditoris accidit, in eo venditor securus est. sed et si post emptionem fundo aliquid per alluvionem accessit, ad emptoris commodum pertinet: nam et commodum eius esse debet, cuius periculum est. Quod si fugerit homo qui veniit aut subreptus fuerit, ita ut neque dolus neque culpa venditoris interveniat, animadvertendum erit, an custodiam eius usque ad traditionem venditor susceperit. sane enim, si susceperit, ad ipsius periculum is casus pertinet: si non susceperit, securus erit. idem et in ceteris animalibus ceterisque rebus intellegimus. utique tamen vindicationem rei et condictionem exhibere debebit emptori, quia sane, qui rem nondum emptori tradidit, adhuc ipse dominus est. idem est etiam de furti et

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which they paid for it: 'emptor autem nummos venditoris facere cogitur,' supr. Perhaps it is more correct to base the rule upon consideration for the vendor, and the desire to facilitate commerce; supposing that the thing does not belong to the vendor, and that it is derelicta by the owner, or accidentally destroyed, or acquired by the vendee per usucapionem, before eviction, the vendor is absolved from all liability, and the parties have achieved what they wished; while, under the same circumstances, if he had to make a good title, the contract would be void ab initio, and could in no way be subsequently validated: see the writer's Contract of Sale in the Civil Law, pp. 103, 104.

If the vendee did not pay the purchase money before or at the time of traditio, he had to pay interest: 'nam cum re emptor fruatur, aequissimum est eum usuras pretii pendere' Dig. 19. 1. 13. 20.

If the purchaser were evicted by process of law, i.e. if the res vendita were recovered from him by some one having higher rights in it than he had himself acquired from the vendor, the latter was liable by the actio empti in damages, Dig. 21. 2. The obligation to compensate on eviction did not apparently always exist, except in sales by mancipation, when the vendor was bound for a limited time, if the vendee were evicted, to return double the price: 'res empta, mancipatione et traditione perfecta, si evincatur, auctoritatis venditor dupli tenus obligatur' Paul. Sent. Rec. 2. 17. 3. Ordinary sales seem to have usually been accompanied by a stipulation, in which the vendor expressly promised a similar penalty in the like event; subsequently it became a general rule of law that, apart from any stipulation, simple damages might be claimed if the title proved defective (simplaria venditio): 'sive tota res evincatur sive pars, habet regressum emptor in venditorem' Dig. 21. 2. 1.

By the civil law the vendor was held impliedly to warrant the quantity and quality of what he sold only where he had been guilty of dolus, Dig. 19. 1. 11. 5; if he falsely stated the acreage of land double damages were recoverable, Paul. Sent. Rec. 1. 19, ib. 2. 17. 4, the remedy in such cases being the actio empti. The curule aediles, in the exercise of their juris-

de damni iniuriae actione. Emptio tam sub condicione quam 4
pure contrahi potest. sub condicione veluti 'si Stichus intra
certum diem tibi placuerit, erit tibi emptus aureis tot'. Loca 5
sacra vel religiosa, item publica, veluti forum basilicam, frustra quis sciens emit, quas tamen si pro privatis vel profanis deceptus a venditore emerit, habebit actionem ex empto, quod non habere ei liceat, ut consequatur, quod sua interest deceptum eum non esse. idem iuris est, si hominem liberum pro servo emerit.

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diction over the markets and market law, extended the obligation by implying a general warranty in sales in open market of slaves, horses, and cattle, enforceable by two new remedies; (1) the actio redhibitoria, which lay only within six months from the date of the contract, and the object of which was to cancel it and recover the purchase money with interest; (2) the actio aestimatoria (or quanti minoris), which enabled the vendee to recover a part of the purchase money proportionate to the defects discovered, and which could be brought at any time within a year. This implied warranty and the aedilician actions were extended to sales of every kind by the jurists after Labeo.

§ 4. Sales 'upon approval', as we call them, could be effected by either a suspensive or a resolutive condition. For an instance of the latter cf. Dig. 18. 5. 6 'si convenit ut res quae venit, si intra certum tempus displicuisset, redderetur, ex empto actio est'. The condition in the text is suspensive, and there is no contract until the would-be purchaser expresses approval, though if the object is injured or destroyed before by his fault he is liable in damages, Dig. 19. 5. 17. 2. Where the condition is resolutive the sale is regarded as pure facta, though liable to be cancelled by the res failing to give satisfaction; and it will be cancelled even though the ground of the disapproval be injury to or destruction of the thing occurring without the vendee's fault. If no time is fixed for the expression of approval or disapproval, it must be stated within a reasonable time ascertained by local or commercial usage.

§ 5. All things, incorporeal (e.g. iura in re aliena and debts) as well as corporeal, and universitates no less than res singulae, can be the objects of a contract of sale, provided they could be the objects of a contract in general as between the particular parties, except the services of a free man. Res extra commercium, if their character is known to the vendee, are thus excluded (fraud by the vendor is not essential, as might be inferred from the text; see Dig. 18. 1. 4; ib. 6 pr.; ib. 34. 2; ib. 70), as also are (1) things which already belong to the purchaser ('suae rei emptio non valet' Dig. 18. 1. 16 pr.), unless the possession or usufruct is vested in some other person, Dig. ib. 34. 4; 41. 2. 28; (2) things which are furtivae to the knowledge of both parties, Dig. 18. 1. 34. 3; and (3) things which are non-existent, unless their future existence is reckoned upon or at least hoped for. In the sale of 'expectations' and things not yet in esse

XXIV

DE LOCATIONE ET CONDUCTIONE

G. iii. 142. **Locatio et conductio** proxima est emptioni et venditioni isdemque iuris **regulis** consistunt. nam ut emptio et venditio ita contrahitur, si de pretio convenerit, sic etiam locatio et conductio ita contrahi intellegitur, si **merces** constituta sit. et competit locatori quidem locati actio, conductori vero con-
1 ducti. Et quae supra diximus, si alieno arbitrio pretium permissum fuerit, eadem et de locatione et conductione dicta esse intellegamus, si alieno arbitrio merces permissa fuerit.
G. iii. 143. **qua de causa si fulloni polienda curandave** aut **sarcinatori**

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the Romans draw a distinction. An emptio of a 'res sperata' was held to be conditional on its future existence ; e.g. a crop which is liable to be destroyed by floods : an 'emptio spei' was absolute, Dig. 18. 1. 8.

Tit. XXIV. In many points, as is observed in the text, the rules of locatio conductio are (mutatis mutandis) identical with those of sale. The contract is concluded as soon as the parties are agreed upon the thing to be let and the hire money (merces), which must be pecunia numerata, § 2, except that the rent of agricultural land may be paid in kind, the amount being fixed either absolutely or at a certain proportion of the yearly fruits, Cod. 4. 65. 21. So too the merces, like the pretium, must be certa and vera, but need not be iusta, understanding these terms in the senses already given to them under Tit. 23 ; nor, finally, need the letter be dominus of that which he lets (Dig. 19. 2. 7 ; ib. 9 pr. and 6) ; else subletting would have been impossible.

Transactions of three different kinds are included under this contract : (1) Locatio conductio rerum, the letting by one (locator) and hiring by another (conductor) of a thing moveable or immoveable (e.g. a house with its premises, in which case the hirer was called inquilinus : or agricultural land, when he was called colonus, Bk. ii. 1. 36 supr.), or even of a res incorporalis, e.g. a usufruct, Dig. 7. 1. 12. 2 ; ib. 38.

(2) Locatio conductio operarum, the letting by one (locator) of his services only to another (conductor), as in all contracts of free service.

(3) Locatio conductio operis, where one (conductor) engages to execute a specific piece of work, e.g. build a house, a ship, a carriage, etc., for another (locator) from materials belonging to or provided by the latter. Here the ordinary use of the terms describing the parties is inverted, the one who contracts to do the work, and who we should say is hired, being regarded as the hirer : but this is in accordance with the original sense of locare, to place out : e.g. locare filiam, locare pecuniam.

§ 1. By the actio praescriptis verbis the contract is stamped as innominate, p. 400 supr. If after having left the remuneration to be fixed by subsequent arrangement between themselves the parties were unable to

sarcienda vestimenta quis dederit nulla statim mercede constituta, sed **postea tantum daturus, quantum inter eos convenerit,** non proprie **locatio et conductio** contrahi intellegitur, sed eo nomine praescriptis verbis actio datur. Praeterea sicut vulgo **2** G.iii.144.
quaerebatur, an permutatis rebus emptio et venditio contrahitur: ita quaeri solebat de locatione et conductione, **si** forte **rem** aliquam **tibi utendam** sive fruendam **quis dederit** et **invicem** a te **aliam utendam** sive fruendam **acceperit.** et placuit non esse locationem et conductionem, sed proprium genus esse contractus. veluti si, cum unum quis bovem haberet et vicinus eius unum, placuerit inter eos, ut per denos dies invicem boves commodarent, ut opus facerent, et apud alterum bos periit: neque locati vel conducti neque commodati competit actio, quia non fuit gratuitum commodatum, verum praescriptis verbis agendum est. **Adeo autem fa-** **3** G.iii.145.
miliaritatem aliquam inter se habere videntur emptio et venditio, item locatio et conductio, ut in quibusdam causis quaeri soleat, utrum emptio et venditio contrahatur, an locatio et conductio. ut ecce **de praediis,** quae **perpetuo** quibusdam fruenda traduntur, id est ut, **quamdiu** pensio sive reditus pro his domino **praestetur, neque ipsi conductori neque heredi eius,** cuive conductor heresve id praedium vendiderit aut donaverit aut dotis nomine dederit aliove quo modo alienaverit, auferre liceat. sed talis contractus, quia inter veteres dubitabatur et a quibusdam locatio, a quibusdam venditio existimabatur: lex Zenoniana lata est, quae emphyteuseos contractui propriam statuit naturam neque ad locationem neque ad venditionem inclinantem, sed suis pactionibus fulciendam, et si quidem aliquid pactum fuerit, hoc ita optinere, ac si naturalis esset contractus, sin autem nihil de

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come to terms, the fullo or sarcinator could bring an actio mandati, Tit. 26. 13 inf.

§ **2.** See Tit. 23. 2 and notes, supr.

§ **3.** For the history and nature of emphyteusis see pp. 323 sq. supr. The enactments of Zeno and Justinian did not (as Mr. Poste, on Gaius iii. 145, supposes) require a written lease for the conclusion of the contract in all cases, but only where the land belonged to the church or a charitable foundation; if the landlord was a lay person, writing was necessary only if and so far as the parties wished to modify the regulations of the ordinary law as settled by those two emperors, Cod. 4. 66. 1, Nov. 120. 6. 1.

periculo rei fuerit pactum, tunc si quidem totius rei interitus accesserit, ad dominum super hoc redundare periculum, sin particularis, ad emphyteuticarium huiusmodi damnum venire.

G.iii.147. 4 quo iure utimur. **Item quaeritur, si cum aurifice Titio convenerit, ut is ex auro suo certi ponderis certaeque formae anulos ei faceret et acciperet verbi gratia** aureos decem, **utrum emptio et venditio an locatio et conductio contrahi videatur? Cassius ait materiae quidem emptionem venditionemque contrahi, operae autem locationem et conductionem. sed placuit tantum emptionem et venditionem contrahi. quodsi suum aurum Titius dederit mercede pro opera constituta, dubium non est, quin locatio et conductio sit.**

5 Conductor omnia secundum legem conductionis facere

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§ 4. The opinion of Cassius had not many supporters in the time of Gaius, who says (iii. 147) 'plerisque placuit emptionem et venditionem contrahi'. The true criterion in such cases is given by Javolenus in Dig. 18. 1. 65 'toties conductio alicuius rei est, quoties materia, in qua aliquid praestatur, in eodem statu eiusdem permanet, quoties vero et immutatur, et alienatur, emptio magis quam locatio intellegi debet'. In iii. 146 Gaius puts the case of one letting out gladiators for the amphitheatre upon terms that a specified sum should be paid for the services of each who came out of the conflict unhurt, and a much larger one for each who was killed or disabled; though it was a moot point, he says the better opinion was that it was hire so far as the first contingency went, and sale so far as the last, each gladiator being the subject of a conditional hiring and a conditional sale, the event determining which of the contracts was to oust the other.

§ 5. The rights and duties of the parties respectively can most conveniently be arranged under the three different forms of the contract.

i. In locatio conductio rerum the locator must allow the conductor to use and often to take the fruits of the res locata during the time agreed upon, unless prevented by impossibility arising from no fault of his own, in which case he cannot demand the merces (Dig. 19. 2. 9. 3–4; ib. 19. 6), though, if he has let a res aliena which its owner recovers from the conductor by real action, he is liable to the latter in damages, whether in fault or not, Dig. 19. 2. 7–9 pr. The thing again must be let in such a condition that it can be used for the purpose agreed upon, Dig. ib. 19. 1; if there are defects of which the locator was aware, he is liable in damages, ib.; if they were unknown to him the merces will be abated in proportion to their importance. Burdens imposed by the law on the res locata itself (e.g. land tax) must be borne by him, Dig. 43. 10. 1. 3; he must execute all repairs, Dig. 19. 2. 15. 1; ib. 19. 2; ib. 25. 2, and compensate the conductor for all necessary repairs and expenditure incurred therein by him as well as for unexhausted improvements, Dig. ib. 19. 4; ib. 55. 1.

debet et, si quid in lege praetermissum fuerit, id ex bono et aequo debet praestare. qui pro usu aut vestimentorum aut argenti aut iumenti mercedem aut dedit aut promisit, ab eo custodia talis desideratur, qualem diligentissimus pater familias suis rebus adhibet. quam si praestiterit et aliquo

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If the locator disabled himself from assuring the conductor the quiet use and enjoyment of the res locata (e.g. land) for the whole of the time agreed upon, as by selling it to a third person before the period for which it was hired had elapsed, he was of course answerable in damages. But the purchaser could evict the lessee even without notice (*Kauf bricht Miethe*): 'qui fundum fruendum vel habitationem alicui locavit, si aliqua ex causa fundum vel aedes vendat, curare debet, ut apud emptorem quoque eadem pactione et colono frui et inquilino habitare liceat: alioquin prohibitus is aget cum eo ex conducto' Dig. 19. 2. 25. 1, 'emptorem quidem fundi necesse non est stare colono, cui prior dominus locavit, nisi ea lege emit' Cod. 4. 65. 9. If not evicted, the conductor must continue to pay his rent to his lessor.

The conductor, besides being answerable, as is said in the text, for exacta diligentia in the care of the res locata, must pay the merces agreed upon, unless through default of the lessor he cannot use the thing for the purpose for which it was hired. If any accident occurs to it whereby its use or productive powers are seriously impaired, he is entitled to have the merces proportionately abated, Dig. 19. 2. 15. 7. In respect of agricultural land there were special regulations, the lessee, if he were prevented from gathering his crops, and so suffered serious loss, by events which we describe as 'the act of God and the king's enemies' (Dig. 19. 2. 15. 2–4), being entitled to a complete remission of rent for the year (Dig. ib. 15. 7), and to a proportionate reduction if the disaster were partial only: 'ubicunque tamen remissionis ratio habetur ex causis supra relatis, non id, quod sua interest, conductor consequitur, sed mercedis exonerationem pro rata'; but if his lease was for a term of years yet unexpired, he must, if possible, make up the amount remitted from unusually good seasons, Dig. 19. 2. 15. 4. The conductor was also bound to re-deliver the res locata at the end of the time for which he had hired it in as good condition as when it came into his hands, saving ordinary wear and tear; if he groundlessly refused to do this up to judgment in an action brought for its recovery Zeno made him liable in duplum, Cod. 4. 65. 33, and he was not exempted from the obligation of restitution even though he were or professed to be its owner; he must give it up, and then he may bring a real action to establish his dominium, Cod. ib. 25. The relations of locator and conductor were not affected by the fact of the latter's subletting, which created no 'privity' between locator and sublessee, though the former had a hypothec over the latter's invecta et illata, which, however, he could evade by paying his rent to the superior instead of the immediate landlord, Dig. 13. 7. 11. 5.

The locator could with impunity withdraw from the contract (1) if the

6 casu rem amiserit, de restituenda ea non tenebitur. Mortuo conductore intra tempora conductionis heres eius eodem iure in conductionem succedit.

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conductor failed to pay the merces for two years, Dig. 19. 2. 54. 1, or used the res locata for other purposes than those for which it was hired, Cod. 4. 65. 3; (2) if repairs were absolutely necessary which would interfere with its use, Cod. ib.; (3) if the res locata were a building, and he required it himself for purposes which could not have been foreseen at the date of the contract, Cod. ib. Conversely the conductor could withdraw, (1) if the lessor failed to deliver the res locata to him at the time agreed upon, or in a fit condition to be used for the purpose designed, Dig. 19. 2. 24. 4, ib. 25. 2, ib. 60 pr.; (2) if he could not use it for that purpose without great risk to himself, Dig. ib. 27. 1, Dig. 39. 2. 28.

ii. In locatio conductio operarum, which, owing to the institution of slavery, is of far less importance in the civil than in modern law, the duties of the locator (servant) are no more than to serve duly and properly for the term agreed upon, though, if prevented by pure accident, he will be excused, Dig. 19. 2. 30. 1. The conductor must pay the wages settled, unless the other fails, even through accident, to perform his part of the contract; in this event his liability is extinguished or reduced pro rata, and he must indemnify the locator for all reasonable expenditure. The so-called operae locari non solitae, or operae liberales—the intellectual services of teachers, advocates, notaries, physicians, etc.—could not be the object of any binding contract, Dig. 11. 6. 1 pr., though if rendered at request honoraria could usually be recovered through the magistrate's extraordinaria cognitio, except by professors of law and philosophy, Dig. 50. 13. 1. 4 and 5.

iii. In locatio conductio operis (which was said to be made 'per aversionem' if the agreement was to do the whole job at a sum absolutely fixed, as distinct from so much per diem, or so much for each portion completed) the conductor operis must execute and deliver the opus according to the specifications, and is answerable for all defects, whether due to his own want of skill or carelessness, or to that of his workmen and subordinates, Dig. 19. 2. 25. 7, ib. 13. 5, ib. 62; after acceptance and approval of the work by the locator this liability is extinguished except where there has been dolus on the conductor's part, Dig. ib. 24 pr. If before completion the work was accidentally destroyed he was entitled to payment so far as he had gone, Dig. ib. 36, 37, 59.

The locator must pay the merces agreed upon, provided the work is satisfactorily executed; but he may withdraw from the contract if the ultimate cost exceeds the estimate given him by the other, Dig. 19. 2. 60. 4.

§ 6. The death of either party did not dissolve the contract unless it was limited either expressly or by implication to the person of the deceased, which in locatio conductio operarum was usually presumed; cf. Dig. 19. 2. 4.

In locatio conductio rerum et operarum, if the hiring was for no specific

XXV

DE SOCIETATE

Societatem coire solemus aut totorum bonorum, quam Graeci specialiter *κοινοπραξίαν* appellant, **aut unius alicuius negotiationis, veluti mancipiorum emendorum vendendo-** G. iii. 148.

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time, either party could terminate the contract by notice of the length prescribed by local or commercial usage. If the conductor rei continued to use the thing, with the other's assent, after the time agreed upon had expired, a new contract was understood to have been made (relocatio tacita); if the res was agricultural land, for a year; if anything else, and the original agreement was in writing, for the term therein specified; if not, for the time during which the contractor actually used the thing.

Tit. XXV. Before distinguishing the different forms which a partnership might assume, two limitations should be noticed which the contract might not transgress. No person could even by express agreement deprive himself of the right, noticed in § 4 inf., of withdrawing from a partnership when he pleased; in other words, there could be no societas in aeternum; 'in societatem nemo compellitur invitus detineri' Cod. 3. 37. 5. Secondly, the purpose for which the contract was formed must be neither unlawful nor immoral: 'generaliter traditur, rerum inhonestarum nullam esse societatem' Dig. 17. 2. 57.

A fuller classification of the species of partnership is given in Dig. 17. 2. 5 and 7, viz.:

(1) Societas omnium bonorum seems to have originated in an ancient practice by which the children of the same father often continued in joint ownership of the family property undivided, under the name consortium: Gellius i. 9. 12. In it all that previously belonged to the socii in severalty becomes their joint property by the mere making of the contract (see on Bk. ii. 1. 40 supr.), as well as everything which any of them may subsequently acquire: 'in societate omnium bonorum omnes res, quae coeuntium sunt, continuo communicantur, quia, licet specialiter traditio non interveniat, tacita tamen creditur intervenisse; ea vero, quae in nominibus sunt, manent in suo statu, sed actiones invicem praestari debent' Dig. 17. 2. 1–3. This rule does not hold in the remaining kinds of societas. Debts contracted by one of the partners, whether before or during the partnership, can be claimed out of the joint property, Dig. ib. 27, which, however, is not liable for damages incurred ex delicto unless it has been augmented from the proceeds of the wrong, ib. 53.

(2) Societas universorum quae ex quaestu veniunt, or ordinary commercial partnership, which, in the absence of express agreement, was presumed to be the transaction intended by the parties. Gains derived from gift, legacy, or inheritance were not included under quaestus, Dig. 17. 2. 7–13.

(3) Societas negotiationis alicuius, agreement for the joint conduct of some special business, e. g. as corn or wine merchants, Dig. ib. 5 pr., ib.

G.iii.150. 1 **rumque,** aut olei vini frumenti emendi vendendique. **Et** quidem **si nihil de partibus lucri et damni** nominatim **convenerit, aequales** scilicet **partes** et in lucro et in damno spectantur. quod si expressae fuerint partes, hae servari debent: nec enim umquam dubium fuit, quin valeat conventio, si duo inter se pacti sunt, ut ad unum quidem duae partes et
2 damni et lucri pertineant, ad alium tertia. De illa sane conventione quaesitum est, si Titius et Seius inter se pacti sunt ut ad Titium lucri duae partes pertineant, damni tertia, ad Seium duae partes damni, lucri tertia, an rata debet haberi
G. iii. 149. conventio? **Quintus Mucius contra naturam societatis** talem pactionem **esse existimavit** et ob id non esse ratam habendam. **Servius Sulpicius, cuius sententia praevaluit,** contra sentit, quia saepe quorundam ita **pretiosa** est **opera** in societate, ut eos iustum sit meliore condicione **in societatem admitti: nam et ita coiri posse societatem non dubitatur, ut alter pecuniam conferat, alter non conferat et tamen lucrum inter eos commune sit, quia saepe opera alicuius pro pecunia valet.** et adeo contra Quinti Mucii sententiam optinuit, ut illud quoque constiterit posse convenire, ut quis lucri partem ferat, damno non teneatur, quod et ipsum Servius convenienter sibi existimavit: quod tamen ita intellegi oportet, ut, si in aliqua re lucrum, in aliqua damnum allatum sit, compensatione facta

52. 4 and 5. A particular form of this was societas vectigalis, formed for the farming of the public revenue, a peculiarity of which was that the rule stated in § 5 inf. did not hold, Dig. 17. 2. 59.

(4) Societas rei unius, the object of which is a single transaction, e. g. the joint purchase of specific property, Dig. ib. 5 pr., ib. 58 pr.

§ 1. As appears from 2 inf. ad fin., by lucrum and damnum is meant a favourable and an adverse balance at the time when the accounts are taken, e.g. at the end of the year, or when the partnership is dissolved. If it were agreed, in a partnership between A and B, that while each should share losses equally, A should have a larger proportion of profits, it was a condition that A should have contributed more than B either of capital, credit, or management, etc.: 'si vero placuerit ut quis duas partes vel tres habeat, alius unam, an valeat? placet valere, si modo aliquid plus contulit societati vel pecuniae vel operae vel cuiuscunque alterius rei causa' Dig. 17. 2. 29. pr. In the text before us (nec enim umquam .... ad alium tertia) the excess contributed by A is to be found by laying stress upon the words 'et damni'.

§ 2. The earlier part of this section seems at first sight to be directly contradicted by Dig. 17. 2. 30 'Mucius scribit, non posse societatem

solum quod superest intellegatur lucri esse. Illud expeditum 3 G.iii.150.
est, si in una causa **pars fuerit expressa, veluti in solo lucro**
vel in solo damno, **in altera vero omissa : in eo quoque quod**
praetermissum est eandem partem servari. **Manet autem** 4 G.iii.151.
societas eo usque, donec in eodem consensu perseveraverint :
at cum aliquis renuntiaverit societati, solvitur societas. sed
plane si quis callide **in hoc renuntiaverit societati, ut obveniens**
aliquod lucrum solus habeat, veluti si totorum bonorum socius,
cum ab aliquo heres esset relictus, in hoc renuntiaverit
societati, ut hereditatem solus lucrifaceret, cogitur hoc lucrum

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coiri, ut aliam damni aliam lucri partem socius ferat. Servius in notatis Mucii ait nec posse societatem ita contrahi, neque enim lucrum intellegitur, nisi omni damno deducto, neque damnum, nisi omni lucro deducto ; sed potest coiri societas ita, ut eius lucri, quod reliquum in societate sit, omni damno deducto, pars alia feratur, et eius damni, quod similiter relinquatur, pars alia capiatur '. What Servius (Sulpicius) meant in this passage was that, if Mucius' dictum be taken literally, it is true, because in a partnership one cannot speak of lucrum *and* damnum, but only of lucrum *or* damnum ; but if it be taken to mean that A and B cannot become partners upon terms that, if the partnership transactions end in a profit, A shall have $\frac{2}{3}$ and B $\frac{1}{3}$, but that if they end in a loss A shall bear $\frac{1}{3}$ and B $\frac{2}{3}$, it is altogether untrue ; though (as is implied in the quia saepe, etc., of our text) such an arrangement is incompatible with the rules of societas unless A contributes more, either money, skill, credit, management, etc., to the business. Sulpicius seems to have been a keen critic of Mucius (Scaevola) : 'Servius Sulpicius reprehensis Mucii capitibus' Gell. 4. 1.

So too it was allowable for A to share in profits, but not in losses, only if he did more for the partnership in some way or other than B, Dig. 17. 2. 29. 1 ; but the converse agreement, that A should help to bear the loss, but should have no share in the profits (called leonina societas from Phaedrus 1. 5) was void : 'iniquissimum enim genus est, ex quo quis damnum, non etiam lucrum spectet' Dig. ib. 29. 2. The reason why such a transaction is invalid as societas is stated in Dig. 24. 1. 32. 24 'nulla societas est, quae donationis causa interponitur' ; though it will stand as a gift, if so intended, and the rules governing such dispositions (pp. 232 supr.) are complied with. If the shares in lucrum and damnum were left to be fixed by one of the partners themselves (Dig. 17. 2. 6), or by a third person (ib. 76–80), it was assumed that the decision would be that of a vir bonus : 'unde, si arbitrium ita pravum est, ut manifesta iniquitas eius appareat, corrigi potest per iudicium bonae fidei' Dig. loc. cit. 79.

§ 4. The prohibition against 'renunciatio callida' may be more widely stated ; a partner who withdrew at a time, or in a manner which would prejudice the interests of the societas, could be compelled to compensate

communicare : si quid vero aliud lucrifaceret, quod non capta-
verit, ad ipsum solum pertinet : ei vero, cui renuntiatum est,
quidquid omnino post renuntiatam societatem adquiritur, soli
G. iii. 152. 5 **conceditur. Solvitur adhuc societas etiam morte socii, quia**
qui societatem contrahit certam personam sibi eligit. sed
et si consensu plurium societas coita sit, morte unius socii
solvitur, etsi plures supersint, nisi si in coeunda societate
6 aliter convenerit. Item si alicuius rei contracta societas sit
7 et finis negotio impositus est, finitur societas. Publicatione

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his socii, Dig. 17. 2. 14 ; ib. 17. 2 ; and if his object was 'ut obveniens aliquod lucrum solus habeat ', and the expected gain turned out a loss, he had to bear it alone : 'Cassius scripsit eum, qui renunciaverit societati, a se quidem liberare socios suos, se autem ab illis non liberare : quod utique observandum est, si dolo malo renunciatio facta sit, veluti si, cum omnium bonorum societatem inissemus, deinde cum obvenisset uni hereditas, propter hoc renunciavit ; ideoque si quidem damnum attulerit hereditas, hoc ad eum qui renunciavit pertinebit, commodum autem communicare cogetur actione pro socio ' Dig. 17. 2. 65. 3. So too if one of two partners renounced while the other was away, the societas was held to be subsisting as regards the duties, but not the rights of the former until the other had received notice of the withdrawal, ib. 17. 1.

§ 5. An agreement that one's heir should succeed one as partner (except in societas vectigalis) was void : 'adeo morte socii solvitur societas, ut nec ab initio pacisci possimus ut heres etiam succedat societati ' Dig. 17. 2. 59 pr., ib. 35 ; but the heir, though not a partner, was bound to complete all business commenced by the deceased, being herein answerable for culpa lata only, Dig. ib. 35, 36, 40. The death of one socius dissolved the contractual relation even between the rest, unless it had been otherwise agreed at the outset, ib. 65. 9 ; but in no case had it any operation until the other partners had heard of the decease, and transactions entered into by them between the death and notice of it were transactions of the firm, ib. 65. 10.

In the time of Gaius capitis deminutio had the same effect on societas as death : 'dicitur et capitis deminutione solvi societatem, quia civili ratione capitis deminutio morti aequiparari dicitur : sed si adhuc consentiant in societatem, nova videtur incipere societas ' Gaius iii. 153, 'societas quemadmodum ad heredes socii non transit, ita nec ad adrogatorem, ne alioquin invitus quis socius efficiatur cui non velit : ipse autem adrogatus socius permanet, nam etsi filiusfamilias emancipatus fuerit, permanebit socius ' Dig. 17. 2. 65. 11 : under Justinian capitis deminutio minima no longer operated in this manner.

§ 6. So too a societas was dissolved by the object for which it was formed proving unattainable, Dig. ib. 58 pr.

§ 7. A forfeiture (publicatio) might be partial only : 'de vi privata damnati pars tertia bonorum ex lege Iulia publicatur ' Dig. 48. 7. 1 pr. ; when

quoque distrahi societatem manifestum est, scilicet si universa bona socii publicentur: nam cum in eius locum alius succedit, pro mortuo habetur. **Item si quis ex sociis** mole debiti prae- 8 G. iii. 154.
gravatus bonis suis cesserit et ideo propter **publica** aut propter **privata** debita substantia eius **veneat, solvitur societas. sed** hoc casu **si adhuc consentiant in societatem, nova vide-** G. iii. 153
tur incipere societas. Socius socio utrum eo nomine tantum 9
teneatur pro socio actione, si quid dolo commiserit, sicut is qui deponi apud se passus est, an etiam culpae, id est desidiae atque neglegentiae nomine, quaesitum est: praevaluit tamen etiam culpae nomine teneri eum. culpa autem non ad exactissimam diligentiam dirigenda est: sufficit enim talem diligentiam in communibus rebus adhibere socium, qualem

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total (the only case in which it extinguished societas) it did so only by producing one of the two higher kinds of capitis deminutio, and so is not a distinct mode of termination: 'damnatione bona publicantur cum aut vita adimitur aut civitas, aut servilis condicio irrogatur' Dig. 48. 20. 1. The 'alius' who succeeds 'universally' is the fiscus, Dig. 46. 1. 71 pr.

§ 8. For cessio bonorum see p. 390 supr. Societas could be dissolved, besides the modes mentioned in the text, (1) by lapse of the time for which it was originally formed, Dig. 17. 2. 1 pr.; ib. 65. 6. Where persons had become partners for a definite term neither could withdraw during it except on a reasonable ground, Dig. ib. 14–16, in the absence of which it was open to the other to treat the partnership as still subsisting in respect of the withdrawer's duties, ib. 65. 6; (2) by division, either voluntary and extrajudicial, or enforced through action by one of the socii: for the form of this see next note.

§ 9. The rights and duties of partners inter se are mainly as follow. Each must contribute the stipulated quota of capital or labour; inability arising from no fault of his own, while exempting him from this duty, at the same time disabled him from enforcing it against the rest, Dig. 17. 2. 58 pr. and 1. In determining what faults were imputable, the standard of diligentia, as is said in the text, was merely that qualem in suis rebus, Exc. VI inf.; the reason assigned for this by Justinian being the same as that which is given in the case of depositum in Tit. 14. 3 supr. If, however, after undertaking the conduct of any particular piece of partnership business, he left it to a subordinate, he was unconditionally answerable for the latter's shortcomings, Dig. 17. 2. 23. Whatever he acquires for the societas, or by its means, he is bound 'communicare', i.e. to throw into the common fund, or to give his socii their fair share, ib. 52 pr., 67 pr.; conversely he can claim to be indemnified for all personal losses and expenses incurred in partnership affairs, ib. 38. 1; 52. 4, and in societas omnium bonorum to have all his debts, except those incurred ex delicto (see p. 443) discharged from the common property. Losses arising from

suis rebus adhibere solet. nam qui parum diligentem socium sibi adsumit, de se queri debet.

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the insolvency of one partner must be divided among all according to the principles stated in §§ 1–3 supr. and notes; Dig. 17. 2. 67 pr.

The remedy by which partners enforced these duties against one another was the actio pro socio, condemnation in which entailed infamia, Bk. iv. 16. 22 inf.; but the defendant could claim beneficium competentiae against the rest, i.e. they were not entitled to take all his property in satisfaction of their claims, but must leave him enough to supply the bare necessities of life, Bk. iv. 6. 38 inf., though Dig. 42. 1. 16 (perhaps incorrectly) limits the beneficium to societas omnium bonorum. Division of the joint property could be compelled by the actio communi dividundo, Bk. iv. 6. 20; ib. 28; iv. 17. 5. inf.

The question of the rights of partners against, and their duties towards, third persons, is a different one. If all the partners together enter into a contract with some one else, they are entitled and bound in relation to him in the ratio of their shares in the lucrum and damnum: 'si tamen plures per se navem exerceant, pro portionibus exercitionis conveniuntur, neque invicem sui magistri videntur' Dig. 14. 1. 4 pr., 'quamvis actio ex empto cum singulis sit pro portione, qua socii fuerunt' Dig. 21. 1. 44. 1. By special agreement such contract may produce an active or passive correal obligation in favour of or binding the partners, and where they are bankers such an obligation results ipso iure from all strictly banking transactions entered into by any of them: 'si plures sint qui eandem actionem habent, unius loco habentur: utputa plures sunt rei stipulandi vel plures argentarii, quorum nomina simul facta sunt; unius loco numerabuntur, quia unum debitum est' Dig. 2. 14. 9 pr.; ib. 25 pr.; ib. 27. But if the contract is made by one or some only of the partners, the question arises how far they confer rights and impose obligations on the rest. Even if the transaction is clearly a partnership transaction, the latter can sue upon it only as assignees, even though it was entered into by their own express instructions, though they are entitled to a cession of the right of action, which, if necessary, they can compel by judicial process.

As regards their liabilities, it should be carefully observed that the partnership is never conceived as a fictitious person, capable in itself of having rights and owing duties, as distinct from the partners; the latter cannot claim that business creditors, in the event of the firm becoming insolvent, shall limit their demands to the partnership assets, though they can insist on the latter being proceeded against and exhausted first, Dig. 17. 2. 65. 14. Three cases, in which the contract is not made by all the partners collectively, need to be distinguished:

(*a*) If the partner who actually makes the contract was instructed to do so by the rest—i.e. is their agent—they are each liable in solidum: 'sed si plures exerceant, unum autem de numero suo magistrum fecerint, huius nomine in solidum poterunt conveniri' Dig. 14. 1. 4. 1; nor could they claim the beneficium divisionis, 'ne in plures adversarios distrin-

XXVI

DE MANDATO

Mandatum contrahitur quinque modis, sive sua tantum gratia aliquis tibi mandet, sive sua et tua, sive aliena tantum, sive sua et aliena, sive tua et aliena. at **si tua** tantum **gratia** tibi mandatum sit, **supervacuum est mandatum** et ob id nulla ex eo obligatio nec mandati inter vos actio nascitur. Man- 1

Cf. G. iii. 155.
G. iii. 156.

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gatur qui cum uno contraxerit'; one who paid of course had regressus, Dig. 14. 3. 13. 2; ib. 14.

(*b*) If he is not their express agent for the purpose, the actually contracting partner alone incurs liability, even though the transaction is entered into on behalf of the firm, unless (1) the rest subsequently ratify it, whereby they become as liable as if it had been authorized by them from the first, and (2) except and so far as the firm has been benefited by the contract: 'iure societatis per socium aere alieno socius non obligatur, nisi in communem arcam pecuniae versae sunt' Dig. 17. 2. 82. Thus in Roman law socii have no implied authority to bind one another even upon transactions which form their ordinary business.

(*c*) If he makes the contract in his own name and on his own account, the rest incur no liabilities even though it results in a benefit to them.

Tit. XXVI. The contract of mandatum produces effects of two different kinds; first, an obligation between the principal (mandator, dominus) and the agent (mandatarius, procurator; the first term is not classical), which is discussed fully in this Title; and second, the relation of representation; this subject, which regards the rights and duties that arise immediately for the principal from the contracts made by his agent on his behalf, is examined in Excursus IX at the end of this Book.

The scope of the agent's commission might be general as well as special, and so might extend to the management of a person's entire affairs; but it might not be unlawful or immoral, § 7 inf., Dig. 17. 1. 6. 3; ib. 12. 11 and 13: it must relate only to future acts, Dig. ib. 12. 14 and 15, and as a rule must be for the doing of something which the mandator could lawfully do for himself, Dig. ib. 6. 6; 8. 5; 10. 4.

Justinian's five species of mandatum are taken from the res quotidianae of Gaius (Dig. 17. 1. 2. 1–6), where, as here, the possible case is omitted of a commission being given by A to B to lend money at interest to C, in order to enable the latter to pay a debt owing to himself, which is in the interest of all three (sua, tua, et aliena). Supervacuum is here used to mean 'void': cf. inutilis in Tit. 19 supr.

§ 1. The use of 'sponderes' is mere pedantry; in Dig. 17. 1. 2. 1; ib. 6. 2; ib. 8. 8, and other passages relating to this subject, we read only of fideiussio. The second of the three instances given here may be illustrated thus. A becomes surety (fideiussor) to you for B, who owes you 50*l.*: on your proposing to sue him on this contract of suretyship,

dantis tantum gratia intervenit mandatum, veluti si quis tibi mandet, ut negotia eius gereres, vel ut fundum ei emeres, vel
2 ut pro eo sponderes. Tua et mandantis, veluti si mandet tibi, ut pecuniam sub usuris crederes ei, qui in rem ipsius mutuaretur, aut si volente te agere cum eo ex fideiussoria causa mandet tibi, ut cum reo agas periculo mandantis, vel ut ipsius periculo stipuleris ab eo, quem tibi deleget in id quod
3 tibi debuerat. Aliena autem causa intervenit mandatum, veluti si tibi mandet, ut Titii negotia gereres, vel ut Titio

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he commissions you (mandat) to sue B, the principal debtor, in lieu of him at his (A's) risk. This is to A's interest, because he is protected from your action at any rate for a time, an advantage which he could not have otherwise secured, as Nov. 4 had not yet introduced the beneficium ordinis (p. 427 supr.); and he is altogether so protected if B proves solvent. It is to your interest, because the mandate may and probably will contain more favourable conditions than the fideiussio, e. g. the security of a hypotheca (*ὑπόθου γὰρ ὅτι ἡ ἐγγύη γέγονε δίχα ὑποθήκης, τὸ δὲ μάνδατον μετὰ ὑποθήκης* Theoph.), and before Justinian's legislation it would have been most advantageous to you if you had been in doubt which was solvent, A or B, for in virtue of it you could first sue B without risk, and then, if he proved to have insufficient assets, you could sue A by actio mandati, which you could not have done by action on the guaranty, because he was released as fideiussor by litis contestatio with B. This was remedied by Justinian in Cod. 8. 41. 28 'generaliter sancimus, quemadmodum in mandatoribus statutum est, ut, contestatione contra unum ex his facta, alter non liberetur, ita et in fideiussoribus observari'.

To explain the third instance we will suppose that A owes 50*l.* to B, who owes the same sum to C. B gives a commission to C to stipulate from A at his (B's) risk that he (A) will pay him (C) the 50*l.* which he owes B; 'delegare est vice sua alium reum dare creditori vel cui iusserit' Dig. 46. 2. 11. As Mr. Poste points out, the result of this transaction, compounded of mandate and stipulation, is two novations, extinguishing the original debts of A to B, and B to C, and creating two new liabilities, a debt of 50*l.* owed by A to C, and a mandate between B and C under which B is guarantor of A; it is to B's interest, because he is released from the action on the debt to C, which might have been stricti iuris, and to which he was immediately liable, and can only be sued, if at all, by actio mandati, which is bonae fidei; it is favourable to C, because he thereby gets two debtors (a principal and a surety) instead of one.

§ 3. If A commissioned B to do something for C, he had no rights against B under the contract unless or until he had an interest in the proper performance of the act undertaken: 'mandati actio tunc competit, cum coepit interesse eius qui mandavit: ceterum si nihil interest, cessat mandati actio, et eatenus competit quatenus interest' Dig. 17. 1. 8. 6. This seems to be contradicted by 6. 4 in the same Title: 'si tibi

fundum emeres, vel ut pro Titio sponderes. Sua et aliena, 4
veluti si de communibus suis et Titii negotiis gerendis tibi mandet, vel ut sibi et Titio fundum emeres, vel ut pro eo et Titio sponderes. Tua et aliena, veluti si tibi mandet, ut Titio 5
sub usuris crederes. quodsi ut sine usuris crederes, aliena

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mandavero quod mea non intererat, veluti ut pro Seio intervenias vel ut Titio credas, erit mihi tecum mandati actio, ut Celsus scribit, et ego tibi sum obligatus'. The explanation, as Dr. Walker observes (Selected Titles from the Digest, Introduction to Part I), is 'that a mandate at the time it is given may be aliena tantum gratia, but that it must become mandantis gratia also before it can be sued upon; and it may become mandantis gratia in two ways. In the first place, this may be the result of the mandatarius beginning to act, for he thus turns his mandator into a negotiorum gestor of the benefited party; i. e. he makes him an unsolicited intermeddler with another's affairs; and a negotiorum gestor is answerable to the stranger for any mismanagement or loss. Hence, from the moment the mandatarius begins to act, the mandator, by reason of his own liability to the stranger, has an interest sufficient to found a right of action against the mandatarius. Secondly, the stranger, because of his knowledge of the mandate having been given, supposing he hears of it, may abstain from executing his own business, so that the non-performance or faulty performance of the mandate may do him hurt; and for this, as traceable to the action of the mandator, he can, as before, hold the mandator responsible in his capacity of a negotiorum gestor.'

§ 5. By the civilians this is called mandatum qualificatum. If A advised or requested (mandavit) B to give credit to C, i.e. either to enter into a contract with him (as to lend him money, § 6 inf.), whereby he became his creditor, or to defer suing upon a debt already owed him by C (Dig. 17. 1. 12. 14), A was taken to warrant C's honesty and solvency, and became answerable to B by actio mandati, if the latter took his advice or complied with his request, that the debt should be discharged; and this even though B would have lent the money, or deferred the suit, in any case. Thus in effect a contract of suretyship, or rather of indemnity, can be made by means of a mandatum, which in this form is usually co-ordinated in the Corpus iuris with fideiussio (Dig. 46. 1, Cod. 8. 41, de fideiussoribus et mandatoribus): cf. Dig. 17. 1. 32 'in summa quicunque contractus tales sunt, ut quicunque eorum nomine fideiussor obligari possit, et mandati obligationem consistere puto: neque enim multum referre, praesens quis interrogatus fideiubeat, an absens mandet'.

The peculiarities of mandatum as a form of suretyship are due to the very fact that it is mandatum, and not constitutum or fideiussio. Thus, the mandator is liable even though owing to incapacity in the third party no principal obligation is established between the latter and the mandatarius, Dig. 4. 4. 13 pr.; he can save himself by revoking the commission so long as it has not yet been acted on, § 9 inf., Dig. 17. 1. 12. 16, and the commission itself is revoked by the mandator's death, § 10 inf.;

6 tantum gratia intercedit mandatum. Tua gratia intervenit mandatum, veluti si tibi mandet, ut pecunias tuas potius in emptiones praediorum colloces, quam feneres, vel ex diverso ut feneres potius, quam in emptiones praediorum colloces. cuius generis mandatum magis consilium est quam mandatum, et ob id non est obligatorium, quia nemo ex consilio mandati obligatur, etiamsi non expediat ei cui dabitur, cum liberum cuique sit apud se explorare, an expediat consilium. **itaque**
G. iii. 156. **si otiosam pecuniam domi te habentem hortatus** fuerit aliquis, **ut rem aliquam emeres** vel eam credas, **quamvis non expediet tibi eam emisse** vel credidisse, **non tamen tibi mandati tenetur. et adeo haec ita sunt, ut quaesitum sit, an mandati teneatur qui mandavit tibi, ut Titio pecuniam fenerares :** sed optinuit **Sabini** sententia obligatorium esse in hoc casu mandatum, **quia non aliter Titio credidisses, quam si tibi mandatum esset.**

G.iii.157. 7 Illud quoque mandatum non est obligatorium, quod **contra bonos mores est, veluti si** Titius de **furto** aut damno faciendo aut de **iniuria facienda** tibi mandet. licet enim poenam istius facti nomine praestiteris, non tamen ullam habes adversus Titium actionem.

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payment by him does not release the principal debtor, Dig. 17. 1. 28, nor did an action brought by mandatarius against mandator or the third party release the other, as formerly was the case with sureties by verbal obligation, note on § 2 supr.; the mandator, even after having paid the mandatarius, can get an assignment of the latter's right of action against the debtor, the debt not being extinguished as it would be in the case of a fideiussor (see on Tit. 20. 4 supr.); and, finally, the mandator himself has an action against the mandatarius if the latter accepted the commission and then did not properly execute it, Dig. 17. 1. 6. 4.

§ 6. So strongly was it felt, Justinian says, that a mandatum tua tantum gratia created no obligation, that people even extended the doubt to those which were for the benefit of a third person as well as of yourself: especially as it seems not improbable from Dig. 17. 1. 6. 4 (cited on § 3 supr.) that a mandate aliena tantum gratia was also originally held to be void. Sometimes a person incurred a liability to compensate in case of loss accruing to the other party even upon a mere consilium; e. g. where by special contract he expressly undertook responsibility for his advice, or where the advice was given with evil intent, for the very purpose of damaging the other: 'consilii non fraudulenti nulla obligatio est: ceterum si dolus et calliditas intercessit, de dolo actio competit' Dig. 50. 17. 47 pr.: cf. the text, 'nemo ex consilio *mandati* tenetur.'

§ 7. See Dig. 17. 1. 6. 3; ib. 22. 6.

Is qui exsequitur mandatum non debet excedere fines 8 G.iii.161. mandati. ut ecce **si quis usque ad centum** aureos **mandaverit tibi, ut fundum emeres** vel ut pro Titio sponderes, neque pluris emere debes neque in ampliorem pecuniam fideiubere, alioquin **non habebis** cum eo **mandati actionem :** adeo quidem, ut **Sabino et Cassio placuerit,** etiam si usque ad centum aureos cum eo agere velis, inutiliter te acturum : diversae scholae auctores recte te usque ad centum aureos acturum existimant : quae sententia sane benignior est. **quod si minoris emeris, habebis scilicet cum eo actionem, quoniam qui mandat, ut sibi centum** aureorum fundus **emeretur, is utique mandasse intellegitur, ut minoris si posset emeretur.**

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§ 8. Gaius seems to have been in two minds as to the rights of an agent who went beyond the price at which he had been commissioned to buy ; in his Institutes he adopts the Sabinian view (iii. 161), while in his res quotidianae (Dig. 17. 1. 4) he says 'sed Proculus recte eum usque ad pretium statutum acturum existimat, quae sententia sane benignior est'.

The principal duties of the agent are—to properly execute his commission, Dig. 17. 1. 5. 1 ; ib. 6. 1 ; ib. 8. 2, or to give notice, if possible, when he is unavoidably prevented, ib. 27. 2 ; in its execution to display exacta diligentia, Cod. 4. 35. 13; to execute it himself in person, unless he has express or implied authority to depute the business to an agent of his own, in which case he is answerable for all shortcomings of his subordinate which he was or ought to have been aware of (culpa in eligendo), Dig. ib. 8. 3 ; to give up all property which comes into his hands in the discharge of his duties, unless lost or destroyed through no fault of his own, ib. 8. 7 and 10, along with fruits and interest, if to produce these be its nature ; to restore, at the expiring of his commission, all that has been entrusted to him ; to give full accounts of his receipts and expenditure to the mandator, and to allow the latter to exercise all rights of action which, while acting in his behalf, he has acquired against third persons.

The principal's remedy against the agent for the breach of any of these duties was the actio mandati directa, condemnation in which entailed infamia, Book iv. 16. 2 inf., though in Cod. 4. 35. 21 this effect is said to ensue only where the agent has been guilty of fraud : cf. Cic. pro Rosc. Am. 38 'mandati constitutum est iudicium non minus turpe quam furti'.

By the actio mandati contraria the agent could compel the principal to indemnify him (with interest, Dig. 17. 1. 10. 9) for all reasonable expenses incurred in the proper execution of his duties, ib. 3. 2, as also against all liabilities which he had undertaken on his behalf, ib. 28. 38 : cf. ib. 45. 3 'si iudicio te sisti promisero nec exhibuero, et antequam praestem mandati agere possum ut me liberes : vel si pro te reus

9 Recte quoque mandatum contractum, si, dum adhuc in-
G. iii. 159. 10 tegra res sit, revocatum fuerit, evanescit. Item si adhuc
G. iii. 160. integro mandato mors alterutrius interveniat, id est vel eius
qui mandaverit, vel eius qui mandatum susceperit, solvitur
mandatum. sed utilitatis causa receptum est, si mortuo eo,
qui tibi mandaverit, tu ignorans eum decessisse exsecutus
fueras mandatum, posse te agere mandati actione: alioquin
iusta et probabilis ignorantia damnum tibi afferat. et huic
simile est, quod placuit, si debitores manumisso dispensatore
Titii per ignorantiam liberto solverint, liberari eos: cum alio-
quin stricta iuris ratione non possent liberari, quia alii solvis-
11 sent, quam cui solvere deberent. Mandatum non suscipere
liberum est: susceptum autem consummandum aut quam

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promittendi factus sim'. The mandator is also answerable for all culpa, and must pay the honorarium, if any, which he has expressly or impliedly promised, Dig. 17. 1. 56. 3; Cod. 4. 35. 1; cf. § 13 inf. But the agent cannot judicially enforce these duties if he has exceeded his instructions, unless he is ready himself to bear the loss thereby sustained, § 8 supr., Dig. ib. 3. 2, or until he has performed, or at least is ready to perform, all that he has undertaken. The liability of several joint mandators is solidary, Dig. ib. 59. 3; ib. 60. 2.

§ **9**. By 'dum adhuc res integra sit' is meant 'before the agent has done anything in the execution of his commission', *πρὶν ἄρξῃ τῆς ἀγορασίας* Theoph. When he had once taken action the mandate became final, for the agent then had an interest in the performance of the duties engendered by the contract: 'si mandassem tibi ut fundum emeres, postea scripsissem, ne emeres, tu antequam scias me vetuisse emisses, mandati tibi obligatus ero, ne damno adficiatur is qui suscipit mandatum' Dig. 17. 1. 15.

§ **10**. What is meant by saying that mandatum is dissolved by the death of either party is that the obligatory relation does not descend to their heirs, so far as any acts performed after the decease are concerned; rights and duties which have already come into existence under it are not extinguished: 'inter causas omittendi mandati etiam mors mandatoris est: nam mandatum solvitur morte: si tamen per ignorantiam impletum est, competere actionem utilitatis causa dicitur. Iulianus quoque scripsit mandatoris morte solvi mandatum, sed obligationem aliquando durare' Dig. 17. 1. 26 pr. But a mandate is not extinguished by the mandator's death, if it was to do something only after that event had occurred: 'si servum ea lege tibi tradidero, ut eum post mortem meam manumitteres, consistit obligatio' Dig. ib. 27. 1.

§ **11**. Cf. Dig. 13. 6. 17. 3 'voluntatis est . . . . suscipere mandatum, necessitatis consummare'. An agent might with impunity throw up a commission which he had once accepted only if (1) he had not proceeded

primum renuntiandum est, ut aut per semet ipsum aut per alium eandem rem mandator exsequatur. nam nisi ita renuntiatur, ut integra causa mandatori reservetur eandem rem explicandi, nihilo minus mandati actio locum habet, nisi si iusta causa intercessit aut non renuntiandi aut intempestive renuntiandi.

Mandatum et in diem differri et sub condicione fieri potest. **12**
In summa sciendum est mandatum, nisi gratuitum sit, in aliam **13** G. iii. 162.
formam negotii cadere: nam **mercede constituta** incipit **locatio et conductio** esse. et ut generaliter dixerimus: quibus casibus sine mercede suscepto officio mandati aut depositi contrahitur negotium, his casibus interveniente mercede locatio et conductio contrahi intellegitur. et ideo **si fulloni polienda curandave vestimenta dederis aut sarcinatori sarcienda** nulla mercede constituta neque promissa, **mandati** competit **actio.**

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so far in its execution as to make it extremely inconvenient for the mandator to intervene in the business himself, or through some other subordinate, Dig. 17. 1. 22. 11; or (2) he had some good reason for the withdrawal: 'ob subitam valetudinem, ob necessariam peregrinationem, ob inimicitiam et inanes rei actiones, integra adhuc causa mandati, negotio renunciari potest' Paul. Sent. Rec. 2. 15. 1; cf. Dig. 17. 1. 23–25.

A mandatum could also be terminated by agreement between principal and agent, by completion of the business with which the latter was entrusted, by lapse of the time for which he was appointed, by the fulfilment of a resolutive condition on which his commission depended, and by its execution becoming impossible through no fault of his own, Dig. 17. 1. 3. 2.

§ **13**. Cf. Dig. 17. 1. 1. 4 'mandatum nisi gratuitum nullum est, nam originem ex officio atque amicitia trahit: contrarium ergo est officio merces'. This, however, is true only in theory, for Severus and Antoninus provided that a promised honorarium might be exacted by appealing to the extraordinaria cognitio of the magistrate: 'de salario quod promisit a praeside provinciae cognitio praebebitur' Cod. 4. 35. 1; cf. Dig. 17. 1. 7: but 'salarium incertae pollicitationis peti non potest' Cod. ib. 17; cf. Dig. ib. 56. 3. The true test is whether the parties intended the remuneration to be recoverable by action: if not, it will be mandatum: 'si remunerandi gratia honor intervenit, erit mandati (not locati or conducti) actio' Dig. ib. 6 pr.

The theoretically gratuitous nature of mandatum distinguishes it from the other consensual contracts, which are all characterised by valuable consideration. Dr. Walker remarks that its true place is midway between the consensual and the real contracts; it is not merely consensual, because

XXVII

DE OBLIGATIONIBUS QUASI EX CONTRACTU

Post genera contractuum enumerata dispiciamus etiam de his obligationibus, quae non proprie quidem ex contractu nasci intelleguntur, sed tamen, quia non ex maleficio sub-
1 stantiam capiunt, quasi ex contractu nasci videntur. Igitur cum quis absentis negotia gesserit, ultro citroque inter eos nascuntur actiones, quae appellantur negotiorum gestorum: sed domino quidem rei gestae adversus eum qui gessit directa competit actio, negotiorum autem gestori contraria. quas ex nullo contractu proprie nasci manifestum est: quippe ita nascuntur istae actiones, si sine mandato quisque alienis negotiis gerendis se optulerit: ex qua causa ii quorum negotia gesta fuerint etiam ignorantes obligantur. idque utilitatis causa receptum est, ne absentium, qui subita festinatione coacti nulli demandata negotiorum suorum administratione peregre profecti essent, desererentur negotia: quae sane nemo curaturus esset, si de eo quod quis impendisset nullam habiturus esset actionem. sicut autem is qui utiliter gesserit negotia habet obligatum dominum negotiorum, ita et contra iste quo-

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either party can withdraw from his engagement re integra; it is not merely real, because the binding 'res' is not delivery, but either an act on the part of the agent, or a forbearance on that of the principal: cf. Hunter's Roman Law, p. 361.

Tit. XXVII. For the meaning of obligatio quasi ex contractu see p. 392 supr.: cf. Holland's Jurisprudence, p. 163. The points in which the relations here described, though not contractual, yet resemble contracts, are (1) that they arise from lawful acts or events; (2) that they produce civil obligations, though this is not their immediate object. The Roman jurists are fond of discovering analogies between them individually and the different contracts proper; those described in §§ 1 and 4 have an affinity with mandatum, those in §§ 3 and 4 with societas, and that in § 6 with mutuum.

§ 1. The quasi-contractual relation of negotiorum gestio was of praetorian origin: 'ait praetor, si quis negotia alterius, sive quis negotia, quae cuiusque cum is moritur fuerint gesserit, iudicium eo nomine dabo. Hoc edictum necessarium est, quoniam magna utilitas absentium vertitur, ne indefensi rerum possessionem aut venditionem patiantur, vel pignoris distractionem, vel poenae committendae actionem, vel iniuria rem suam amittant' Dig. 3. 5. 3 pr.; ib. 1. To constitute the relation it is necessary that the business in which the gestor interferes should be some one's else

que tenetur, ut administrationis rationem reddat. quo casu ad exactissimam quisque diligentiam compellitur reddere rationem : nec sufficit talem diligentiam adhibere, qualem suis rebus adhibere soleret, si modo alius diligentior commodius administraturus esset negotia. Tutores quoque, qui tutelae 2
iudicio tenentur, non proprie ex contractu obligati intelleguntur (nullum enim negotium inter tutorem et pupillum

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and not his own, Dig. ib. 6. 4 (no stress should be laid on 'absentes' in our text), and that his interference should not be grounded on any office or express mandate on which he can sue; if there has been a mandatum, but no actio mandati lies, he can sue as negotiorum gestor, Dig. ib. 19. 2. His duties are in substance the same as those of a commissioned agent, for which see on Tit. 26. 8 supr. Those of the dominus negotii are mainly to indemnify the gestor against all reasonable expenses, with interest, and to guarantee him against all liabilities which he has incurred on his behalf, Dig. ib. 10 pr.; but the gestor could not enforce these duties by actio contraria, unless

(1) The dominus had not prohibited his interference, Cod. 2. 19. 24.

(2) His own intention in undertaking the business had been to lay the other under a legal obligation, 'negotia eo animo gerit, ut aliquem sibi obliget' Dig. 10. 3. 14. 1; so that if his object was his own sole advantage he could sue the dominus only so far as the latter had derived material benefit from his gestio, Dig. 3. 5. 6. 3. If he unwittingly interfered with another person's business (e.g. as being a bona fide possessor) he could assert his claim to compensation for reasonable outlay only by exceptio, unless what he 'possessed' was an hereditas, in which case he had an action, Dig. ib. 49; 10. 13. 14. 1; ib. 29 pr.

(3) The state of the dominus' affairs was such that, except for the foreign intervention, he would be seriously prejudiced, Dig. 44. 7. 5 pr.; if this is so, the gestor can recover even though the anticipated benefit as a fact is not realized, or, as it is sometimes put, the negotia need not have been utiliter gesta, it is enough if they were utiliter coepta, Dig. 3. 5. 10. 1; ib. 12. 2. If the gestio was not thus warranted, but the gestor's object was to secure a great advantage for the dominus, he could recover only so far as the advantage actually went, Dig. ib. 11; ib. 43.

Subsequent ratification of the gestio by the dominus transforms the relation into mandatum according to Ulpian in Dig. 50. 17. 60, while Scaevola in Dig. 3. 5. 9 says that its character remains unaltered. The solution of the antinomy is probably that after ratification the gestor can treat the dominus as mandator, but the latter (ratification being merely a unilateral act) is not entitled to treat the former as mandatarius.

§ **2.** Cf. Bk. i. 20 supr. and note. The duties which the pupillus could enforce against the guardian by actio tutelae directa were, in general, those of maintaining the full value of his property, and to a certain extent even of increasing it. The guardian was bound to keep it in good order and

contrahitur): sed quia sane non ex maleficio tenentur, quasi ex contractu teneri videntur. et hoc autem casu mutuae sunt actiones: non tantum enim pupillus cum tutore habet tutelae actionem, sed et ex contrario tutor cum pupillo habet contrariam tutelae, si vel impenderit aliquid in rem pupilli vel pro eo fuerit obligatus aut rem suam creditori eius obligaverit.
3 Item si inter aliquos communis sit res sine societate, veluti quod pariter eis legata donatave esset, et alter eorum alteri ideo teneatur communi dividundo iudicio, quod solus fructus ex ea re perceperit, aut quod socius eius in eam rem necessarias impensas fecerit: non intellegitur proprie ex contractu obligatus esse, quippe nihil inter se contraxerunt: sed quia non ex maleficio tenetur, quasi ex contractu teneri videtur.
4 Idem iuris est de eo, qui coheredi suo familiae erciscundae
5 iudicio ex his causis obligatus est. Heres quoque legatorum nomine non proprie ex contractu obligatus intellegitur (neque enim cum herede neque cum defuncto ullum negotium lega-

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condition, Cod. 5. 37. 22. 3 and 4, and to sell such parts of it as were liable to spoil; to call in all doubtful debts, Dig. 26. 7. 15; if the property consisted mainly of money, to lay it out on land, ib. 3. 2, or at interest, ib. 7. 3; and if he used any of it for his own purposes, the rate of interest which he had to pay was the highest allowed by law, ib. 7. 10 and 12; to duly conduct all necessary suits on the ward's behalf, ib. 1, 3 and 4, and in the discharge of all these duties to exercise at least that degree of care which he showed in his own affairs, i. e. he was answerable for culpa levis in concreto, Dig. 27. 3. 1 pr. This would be of importance where the ward was instituted heir, or left a legacy or fideicommissum, Dig. 26. 7. 39. 3.

§ 3. This is called by the commentators communio incidens: cf. Dig. 17. 2. 31 'cum non affectione societatis incidimus in communionem'. The rights and duties of the colegatees, codonees, etc., inter se resemble those of partners, for which see on Tit. 25. 9 supr.

§ 4. Each of two or more coheirs, if they could not make a satisfactory partition by agreement, could compel a judicial division of the inheritance by the actio familiae erciscundae, in which the judge also adjusted all claims which each had acquired against the rest while their coheir (e. g. by paying debts, management, etc.), during which time their rights and duties inter se are substantially the same as those of partners.

§ 5. In Gaius ii. 35 and 36, the aditio of the hereditas, which creates this quasi-contractual relation between heirs and legatees, is itself called obligatio. Where the res legata was specific property of the testator's own, the legatee had a right in rem, and could recover it by vindicatio: see p. 291 supr.

tarius gessisse proprie dici potest): et tamen, quia ex maleficio non est obligatus heres, quasi ex contractu debere intellegitur.
Item is, cui quis per errorem non debitum solvit, quasi ex 6
contractu debere videtur. adeo enim non intellegitur proprie ex contractu obligatus, ut, si certiorem rationem sequamur, magis ut supra diximus ex distractu, quam ex contractu possit dici obligatus esse: nam qui solvendi animo pecuniam dat, in hoc dare videtur, ut distrahat potius negotium quam contrahat. sed tamen proinde is qui accepit obligatur, ac si mutuum illi daretur, et ideo condictione tenetur. Ex qui- 7
busdam tamen causis repeti non potest, quod per errorem non debitum solutum sit. sic namque definiverunt veteres: ex quibus causis infitiando lis crescit, ex his causis non debitum solutum repeti non posse, veluti ex lege Aquilia, item ex legato. quod veteres quidem in his legatis locum habere voluerunt, quae certa constituta per damnationem cuicumque fuerant legata: nostra autem constitutio cum unam naturam omnibus legatis et fideicommissis indulsit, huiusmodi augmentum in omnibus legatis et fideicommissis extendi voluit: sed non omnibus legatariis praebuit, sed tantummodo in his legatis et fideicommissis, quae sacrosanctis ecclesiis ceterisque venerabilibus locis, quae religionis vel pietatis intuitu honorificantur, derelicta sunt, quae si indebita solvantur, non repetuntur.

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§ **6.** Cf. Tit. 14. 1 and notes, supr.

§ **7.** The cases of lis crescens enumerated by Gaius in iv. 9 and 171 are the actiones iudicati, depensi (note on Tit. 20 pr. supr.) damni iniuria ex lege Aquilia, and that for the recovery of a legatum per damnationem. Besides claims for legacies ad pias causas (for which cf. Bk. iv. 6. 19 inf.), we must add the actions on depositum miserabile (note on Tit. 14. 3 supr.) Bk. iv. 6. 26 inf.; on a bond whose authenticity is denied by the giver, Nov. 18. 8, and under some circumstances the actio redhibitoria, Dig. 21. 1. 45. The reason why condictio indebiti is excluded in these cases has been pointed out on p. 395 supr. If the condictio had been allowed, the double damages need never be incurred; the defendant would pay the simplum, and then practically deny his liability by disputing the correctness of the payment in condictio indebiti, failure in which would leave him no worse off than he was before.

XXVIII

PER QUAS PERSONAS NOBIS OBLIGATIO ADQUIRITUR

G. iii. 163. **Expositis generibus obligationum, quae ex contractu** vel quasi ex contractu **nascuntur, admonendi sumus adquiri vobis non solum per vosmet ipsos, sed etiam per eas quoque personas, quae in vestra potestate sunt,** veluti per servos vestros et filios: ut tamen, quod per servos quidem vobis adquiritur, totum vestrum fiat, quod autem per liberos, quos in potestate habetis, ex obligatione fuerit adquisitum, hoc dividatur secundum imaginem rerum proprietatis et ususfructus, quam nostra discrevit constitutio: ut, quod ab actione commodum perveniat, huius usumfructum quidem habeat pater, proprietas autem filio servetur, scilicet patre actionem movente secundum
G.iii.164. 1 novellae nostrae constitutionis divisionem. Item **per liberos homines et alienos servos, quos bona fide possidetis, adquiritur vobis, sed tantum ex duabus causis, id est si quid ex**
G.iii.165. 2 **operis suis vel ex re vestra adquirant. Per eum quoque servum, in quo usum fructum** vel usum **habetis, similiter ex**

Tit. XXVIII. Obligatio in this Title means a right arising ex contractu: it tells us who takes the benefit of a contract made by a filiusfamilias, slave, or free man bona fide serviens: cf. Tit. 17 supr. The converse question, how far the superior is bound by their promises, is treated in Bk. iv. 7 inf.

For the 'divisio rerum proprietatis et ususfructus' see on Bk. ii. 9 pr. supr. The profit arising from the contracts of a filiusfamilias was not necessarily divided in this manner. If he had only castrense or quasi-castrense peculium, it was all his own, and on such contracts he could sue in person, Dig. 14. 6. 2. If his peculium was profectitium only, it was all the father's; if he had adventitium as well, the father had a usufruct in the commodum obligationis in the ratio which it bore to the other peculia 'quae adquisitionem effugiunt' Cod. 6. 61. 6. The action on these contracts must be brought in the father's name, but the son might conduct them as his attorney; for other exceptional cases in which the filiusfamilias had a right of action see p. 127 supr.

§ 1. Cf. Bk. ii. 9. 4 and notes, supr.

§ 2. The slave in whom one has a usus is not mentioned above in Bk. ii. 9. 4, and what is said here, that all commodum arising ex operis suis accrues to the person having the use, seems irreconcileable with Dig. 7. 8. 14 pr. 'per servum usuarium si stipuler vel per traditionem accipiam, an adquiram, quaeritur, si ex re mea vel ex operis eius, et si quidem ex operis eius, non valebit, quoniam nec locare eius operas possumus; sed

duabus istis causis vobis adquiritur. Communem servum pro 3 G. iii. 167.
dominica parte dominis adquirere certum est, excepto eo, quod uni nominatim stipulando aut per traditionem **accipiendo illi soli adquirit, veluti, cum ita stipuletur : 'Titio** Cf. G. iii. 167[a].
domino meo dare spondes ?' sed si unius domini iussu servus fuerit stipulatus, licet antea dubitabatur, tamen post nostram decisionem res expedita est, ut illi tantum adquirat, qui hoc ei facere iussit, ut supra dictum est.

XXIX

QUIBUS MODIS OBLIGATIO TOLLITUR

Tollitur autem omnis **obligatio solutione eius quod debetur,** G. iii. 168.
vel **si quis consentiente creditore aliud pro alio solverit.** nec tamen interest, quis solvat, utrum ipse qui debet an alius pro

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si ex re mea, dicimus servum usuarium stipulantem vel per traditionem accipientem mihi adquirere, cum hac opera eius utar'. The truth seems to be that the benefit of any contract made by a slave ex re usuarii vested in the latter, though he could not let out the slave's services : if the latter let them out himself the merces could be claimed by the usuary.

§ **3.** Cod. 4. 27. 2 ; cf. Tit. 17. 3 and notes, supr.

Tit. XXIX. After describing how obligations may arise ex contractu and quasi ex contractu, Justinian proceeds to show how they are discharged. Here the metaphor by which their creation is so vividly presented is consistently continued : an obligation is dissolved by the untying of the knot by the tying of which it was imposed, the general term employed being solvere, in the sense of loosing or releasing : 'solvisse accipere debemus non tantum eum, qui solvit, verum omnem omnino qui ea obligatione liberatus est, quae ex causa iudicati descendit' Dig. 42. 1. 4. 7, 'solvere dicimus eum, qui id facit quod facere promisit' Dig. 50. 16. 176, 'solutionis verbum pertinet ad omnem liberationem quoquo modo factam, magisque ad substantiam obligationis refertur quam ad nummorum solutionem' Dig. 46. 3. 54. In connection with the different classes of contracts indeed the jurists love the conceit, which under the earlier law was a fact, that to the causa by which the obligation is engendered in each of them respectively there should be a peculiarly corresponding mode of release : 'nihil tam naturale est quam eo genere quidque dissolvere quo colligatum est. Ideo verborum obligatio verbis tollitur ; nudi consensus obligatio contrario consensu dissolvitur' Dig. 50. 17. 35 ; cf. ib. 100, and Dig. 46. 3. 80. Obligations incurred literis (Excursus VIII inf.) could apparently be extinguished by the creditor's entering the receipt of an equivalent sum from the debtor on the opposite page of the ledger (accepti relatio : cf. Gaius iv. 64) ; and Gaius tells us (iii. 173–5) that debts incurred in mancipation form or by judgment were properly

eo : liberatur enim et alio solvente, sive sciente debitore sive ignorante vel invito solutio fiat. item si reus solverit, etiam

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dissolved by a corresponding nexi liberatio, a 'species imaginariae solutionis per aes et libram', employed even in his own day to acknowledge payment of judgment debts and legata per damnationem ; see Poste's Gaius, p. 418.

But a more important distinction between the modes in which obligations may be invalidated or rendered ineffectual, not alluded to in this Title, is the following. To some events the law attaches the effect of altogether extinguishing the obligatio ; it ceases to exist, and there is no longer any vinculum iuris between the parties ; the obligatio, as it is said, ipso iure tollitur, perimitur, evanescit. Under the older law, unless it was discharged in this manner, an obligation was altogether unaffected ; so that (e. g.) if a solemn form of payment was prescribed which the debtor did not observe, he could be sued and forced to pay again. But later a new mode arose in which a debtor could defeat his creditor ; though he could not deny the existence of the obligatio, he might himself have a right which he could set up against that of the other, whereby his claim, if asserted by legal process, could be successfully repelled ; ipso iure, the obligatio still subsists, but it is rendered inoperative, and in effect cancelled, by the counter right of the debtor, or, as it is said, ope exceptionis actor summovetur, removetur, expellitur, excluditur ; he is kept at bay by the plea of the defendant. The processual significance of exceptiones is treated in the notes to Bk. iv. 13 inf. ; here all that need be considered is their operation. In some cases this is stronger and more potent than in others ; in some the plea will avail at all times and under all circumstances, in others it will be only temporary (Bk. iv. 13. 8–11 inf.). Those which have the stronger effect practically (though not in form) extinguish the obligation, or, as Mr. Poste puts it, they neutralize naturalis as well as civilis obligatio, as is shown by the fact that if the debtor pays by mistake he can recover by condictio indebiti ; 'indebitum autem solutum accipimus non solum si omnino non debeatur, sed et si per aliquam exceptionem peti non poterat ; quare hoc quoque repeti poterit, nisi sciens se tutum exceptione solvit' Dig. 12. 6. 26. 3, 'adeo autem perpetua exceptio parit condictionem, ut Iulianus scripsit, si emptor fundi damnaverit heredem suum ut venditorem nexu venditi liberaret, mox venditor ignorans rem tradiderit, posse eum fundum condicere, idemque et si debitorem suum damnaverit liberare et ille ignorans solverit' Dig. ib. 7. Among exceptions with this greater potency are exceptio pacti, Dig. ib. 40. 2 ; exceptio doli, ib. 65. 1 ; and exceptio metus, Dig. 12. 5. 7 ; and their protection is so nearly on a par with that of extinction ipso iure that it is said in Dig. 50. 17. 112 'nihil interest ipso iure quis actionem non habeat, an per exceptionem infirmetur' : cf. Dig. 40. 12. 20. 3 'obligatum accipere debemus, qui exceptione se tueri non potest ; ceterum si potest, dicendum non esse obligatum'. Those exceptions which have only the weaker effect, though they prevent the creditor from succeeding in an action, yet leave

ii qui pro eo intervenerunt liberantur. idem ex contrario contingit, si fideiussor solverit: non enim solus ipse liberatur, sed

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the obligatio subsisting naturaliter, with all or most of the incidents which characterise such relations (Excursus V inf.). As a general rule every exceptio will have the stronger efficacy if based upon the ius gentium and natural equity: 'desinit debitor esse is, qui nactus est exceptionem iustam nec ab aequitate naturali abhorrentem' Dig. 50. 17. 66.

Thus the distinction between extinction ipso iure, and invalidation ope exceptionis, is not one of degree, for some exceptions produce an effect undistinguishable from extinction; it consists in the mode of their operation. A right extinguished ipso iure can never recover its vitality; but, given an event which operates only ope exceptionis, i. e. confers a countervailing right on the debtor, the obligatio still subsists, and should the debtor's right be itself destroyed, will once more become enforceable, and recover its original value. In the first case only a *new* right can come into existence, which implies that all the conditions ordinarily required for the creation of an obligation must be satisfied, so that a mere renunciation by the debtor of the benefit which has accrued to him in the destruction of the creditor's right will not reestablish the creditor in statu quo unless such renunciation suffices in the particular case for the creation of an obligation; 'si pactum conventum tale fuerit, quod actionem [ipso iure] tolleret, velut iniuriarum, non poterit, postea paciscendo ut agere possit, agere, quia et prima actio sublata est, et posterius pactum ad actionem reparandam inefficax est . . . . idem dicemus et in bonae fidei contractibus, si pactum conventum totam obligationem sustulerit, veluti empti, non enim ex novo pacto prior obligatio resuscitatur, sed proficiet pactum ad novum contractum' Dig. 2. 14. 27. 2. But in the second case it would be otherwise; the old right is not destroyed, but only balanced by a colliding or countervailing right in the debtor; and if the latter right is in any way extinguished, even by mere waiver, the former will recover all its original force: 'pactus ne peteret, postea convenit ut peteret. Prius pactum per posterius elidetur; non quidem ipso iure, sicut stipulatio tollitur per stipulationem, si hoc actum est, quia in stipulationibus ius continetur, in pactis factum versatur, et ideo replicatione (Bk. iv. 14 inf.) exceptio elidetur' Dig. loc. cit.

In this Title Justinian touches only upon those modes in which obligations are extinguished ipso iure and absolutely; this is the meaning of the word 'tollitur', which apparently is not used when the creditor's right is merely deprived of its efficacy ope exceptionis. This treatment, however, is open to the criticism that, if it is intended to relate to the modes in which all obligations may be dissolved, it is wrongly placed, its proper position being between Titles 5 and 6 of Book iv, and also omits one important mode in which some obligations ex delicto could be extinguished; while, if it purports to describe only the discharge of contractual obligation, it is pro tanto inadequate, and even on that supposition inexhaustive; yet this seems to be what was in fact intended by Gaius, whom Justinian here follows closely.

G.iii.169. **1** etiam reus. **Item per acceptilationem tollitur obligatio. est autem acceptilatio imaginaria solutio. quod enim ex verborum obligatione Titio debetur, id si velit Titius remittere, poterit sic fieri, ut patiatur haec verba debitorem dicere : ' quod ego tibi promisi habesne acceptum ? '** et Titius **respondeat ' habeo ' :** sed et Graece potest acceptum fieri, dummodo sic fiat, ut Latinis verbis solet : *ἔχεις λαβὼν δηνάρια*
G. iii. 170. *τόσα ; ἔχω λαβών.* **quo genere ut diximus tantum eae obligationes solvuntur, quae ex verbis consistunt, non etiam ceterae : consentaneum enim visum est verbis factam obliga-**

The effect of datio in solutum, the payment of aliud pro alio with the creditor's consent, was in Gaius' time (iii. 168) matter of dispute. The Sabinians (whom Justinian follows) held that it operated ipso iure, the Proculians, that it only gave rise to an exceptio doli if an action were subsequently brought on the debt. The creditor must take 'aliud pro alio' nolens volens if it becomes impossible to discharge the obligation in the proper way without the debtor's default, and at the same time without entirely releasing the latter ; e. g. where the obligation is to convey a res aliena which the owner will not sell (Dig. 30. 71. 3) he must accept its value. By Nov. 4. 3 Justinian enacted that if a person was absolutely unable to pay a money debt, he might compel the creditor to select an equivalent from his property, provided he gave security against eviction.

Solutio must be made to either the creditor in person or his agent ; guardians and persons solutionis causa adiecti (e. g. mihi aut Titio dare spondes ? Tit. 19. 4 supr.) were regarded as his mandataries. If the debtor was unable to pay the creditor, either because he could not find him, or because the latter refused to accept payment, or from uncertainty as to who his real creditor was, he could release himself by deposit in court, Cod. 8. 43. 9. Payment by the fideiussor released the principal only if the former had not previously procured an assignment to himself of the creditor's rights against him (p. 426 supr.). If the suretyship took the form of mandatum it was never so, Dig. 17. 1. 28 : cf. note on Tit. 26. 5 supr.

§ **1.** Acceptilatio is a formal acquittance from an obligation incurred by stipulation, perhaps employed for security's sake even where the debt was otherwise discharged (e. g. by payment), and not only (as the text suggests) when a gratuitous release was intended. Its specialisation to the extinction of obligations incurred verbis is alluded to in Terence, Adelph. 2. 1. 10 'neque tu *verbis* solves unquam, quod mihi *re* male feceris '. Whether an acceptilatio in partem debiti was valid had been disputed in Gaius' time, iii. 172. Justinian's statement of the law must be taken subject to the distinction drawn by Ulpian : 'si id, quod in stipulationem deductum est, divisionem non recipiat, acceptilatio in partem nullius erit momenti, ut puta si servitus fuit praedii rustici vel

tionem posse aliis verbis dissolvi: sed id, quod ex alia causa debetur, potest in stipulationem deduci et per acceptilationem dissolvi. sicut autem quod debetur pro parte recte solvitur, ita in partem debiti acceptilatio fieri potest. Est prodita 2
stipulatio, quae vulgo Aquiliana appellatur, per quam stipulationem contingit, ut omnium rerum obligatio in stipulatum deducatur et ea per acceptilationem tollatur. stipulatio enim Aquiliana novat omnes obligationes et a Gallo Aquilio ita composita est: 'quidquid te mihi ex quacumque causa dare facere oportet oportebit praesens in diemve quarumque rerum mihi tecum actio quaeque abs te petitio vel adversus te persecutio est erit quodque tu meum habes tenes possides possideresve dolove malo fecisti, quo minus possideas: quanti quaeque earum rerum res erit, tantam pecuniam dari stipulatus est Aulus Agerius, spopondit Numerius Negidius.' item e diverso Numerius Negidius interrogavit Aulum Agerium: 'quidquid tibi hodierno die per Aquilianam stipulationem spopondi, id omne habesne acceptum?' respondit Aulus

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urbani. Plane si ususfructus sit in stipulationem deductus, puta fundi Titiani, poterit pro parte acceptilatio fieri et erit residuae partis fundi ususfructus: si tamen viam quis stipulatus accepto iter vel actum fecerit, acceptilatio nullius erit momenti' Dig. 46. 4. 13. 1. The words 'ut diximus' in this section are taken from Gaius iii. 170, and apparently refer to some passage in his Institutes which has not come down to us, or perhaps to one of his other works.

§ **2.** As is said in the preceding section, a debt incurred in any way whatsoever could be transformed by novatio into a verbal obligation and then released by acceptilatio. To Gallus Aquilius (note on Bk. ii. 13. 1 supr.) must be awarded the merit of having devised a formula by which all obligations in which one and the same person was debtor, and another and the same creditor, could be embraced in a single novatio, and thereby be converted into a single obligation, which could then, if required, be released in this manner. This, however, was not always the object of the Aquilian stipulation, which, it is clear, was not unfrequently employed as a comprehensive novation, the duties created by which were intended to be, not released, but performed, Paul. Sent. Rec. 1. 1. 3, Cod. 2. 4. 3, Dig. 2. 15. 2; ib. 9. 2. In the stipulation itself, as here presented to us, the following possible claims are comprised: those arising from contracts whether stricti iuris or bonae fidei (dare, facere), whether present or future (oportet, oportebit), and whether existing and actionable at once, or existing but not yet actionable (praesens in diemve); those enforceable by real (petitio) as well as by personal action (actio), whether now (est) or in the future (erit), and by extraordinaria cognitio (persecutio) no

G.iii.176. 3 Agerius: 'habeo acceptumque tuli.' Praeterea novatione tollitur obligatio. veluti si id, quod tu Seio debeas, a Titio dari stipulatus sit. nam interventu novae personae nova nascitur obligatio et prima tollitur translata in posteriorem, adeo ut interdum, licet posterior stipulatio inutilis sit, tamen prima novationis iure tollatur. veluti si id, quod Titio tu debebas, a pupillo sine tutoris auctoritate stipulatus fuerit, quo casu res amittitur: nam et prior debitor liberatur et posterior obligatio nulla est. non idem iuris est, si a servo quis stipulatus fuerit: nam tunc prior proinde obligatus manet, ac

G. iii. 177. si postea a nullo stipulatus fuisset. sed si eadem persona sit, a qua postea stipuleris, ita demum novatio fit, si quid in posteriore stipulatione novi sit, forte si condicio aut dies aut

G. iii. 179. fideiussor adiciatur aut detrahatur. quod autem diximus, si

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less than by ordinary action at law, and whether the promisor has merely detention (habes, tenes) or has or has had civil possession (possides, possedisti). The omission of the word praestare in the form of personal action (dare facere oportet) possibly shows that the author did not intend to include obligations arising ex delicto; and the phrase 'dolove malo fecisti quominus possideas' refers to the dominus' real action against a person who had fraudulently destroyed or conveyed away a res aliena. This was first given by the SC. Juventianum, Dig. 5. 3. 20. 6; 6. 1. 27. 3, so that the words cannot have formed part of the original Aquilian stipulation, and do not even appear in the form of it given by Florentinus in Dig. 46. 4. 18. 1. In the acceptilatio of Justinian's text the words 'acceptumque tuli' are superfluous (see § 1) and must not be taken to refer in any way to the literal contract or any other system of accounts. As Mr. Poste remarks, the narrative form (stipulatus est, spopondit, interrogavit), in which the transaction is expressed by Justinian, properly belongs, not to the stipulation and acceptilation, but to the cautio in which they are embodied or recorded.

§ 3. 'Novatio est prioris debiti in aliam obligationem vel civilem vel naturalem transfusio atque translatio, hoc est, cum ex praecedenti causa ita nova constituatur, ut prior perimatur' Dig. 46. 2. 1 pr.; novation is the extinction of one obligation by the substitution for it of another. But the object of the new must be the same as that of the old obligation (idem debitum), though it is allowable, as in the Aquilian stipulation, to promise the value of a thing instead of the thing itself: Dig. 46. 2. 28. Originally it could take place in two ways, transcriptio (Excursus VIII inf.) and stipulatio; but in Justinian's time, and probably in that of Gaius (iii. 176), the latter was the only means available for the purpose. The end in view in a novation may be either to change one of the parties to the subsisting obligation, or to modify its terms, or, without changing the parties, to alter its nature by converting a real or consensual into a verbal

condicio adiciatur, novationem fieri, sic intellegi oportet, ut ita dicamus factam novationem, si condicio extiterit: alioquin si defecerit, durat prior obligatio. Sed cum hoc quidem inter veteres constabat tunc fieri novationem, cum novandi animo in secundam obligationem itum fuerat: per hoc autem dubium erat, quando novandi animo videretur hoc fieri et quasdam de hoc praesumptiones alii in aliis casibus introducebant: ideo nostra processit constitutio, quae apertissime definivit tunc solum fieri novationem, quotiens hoc ipsum inter contrahentes expressum fuerit, quod propter novationem prioris obligationis convenerunt, alioquin manere et pristinam obligationem et secundam ei accedere, ut maneat ex utraque causa obligatio secundum nostrae constitutionis definitiones,

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obligation. The first of these ends is illustrated in the text by the words veluti si id . . . in posteriorem; the others, by the paragraph commencing sed si eadem persona . . . .

The parties may be changed in two ways. Firstly, the creditor may be changed, the amount and terms of the debt remaining the same. Thus, if A owes B 5*l*., and C (with B's consent) stipulates from A for payment of that debt to himself, A's debt to B is extinguished. The same effect might be produced, though with a technical difference of remedy, without novation, by B's assigning his rights against A to C, Gaius ii. 38, 39, Excursus V inf. Secondly, the debtor might be changed, the creditor remaining the same. Thus, if under the circumstances supposed, B stipulated from C for payment to himself of the 5*l*. which A owed him, A's debt to B would be cancelled. If this was done with A's assent, it is usually called delegatio; if not, expromissio.

It is immaterial whether the obligation which is novated be civilis or merely naturalis: its extinction involves that of all rights which were accessory to it, such as guaranties, hypothecs, claims for interest and penalties, etc., Dig. 46. 2. 15; ib. 18; ib. 27; ib. 29. So too, as is said in the text, the obligation created by the novating contract will extinguish the old one even though it be natural only, i. e. for some reason or other not enforceable by action. But two obligations are essential; if there is not one to novate, the attempted novation is null; if there is one to novate, but the novating contract is void (e. g. 'si id quod tu mihi debeas, a peregrino, cum quo sponsus communio non est, spondes verbo stipulatus sim' Gaius iii. 179), the former is altogether unaffected.

The promise of a slave ordinarily created a natural obligation, and consequently, as Servius Sulpicius argued (Gaius, loc. cit.), it is hard to see why it should have no novative effect; the explanation given by Theophilus is *ὅτι ποιεῖ νοβατίωνα οὐ μόνον τὸ τίκτεσθαι φυσικὴν ἐνοχήν, ἀλλὰ καὶ τὸ ὑπεῖναι πρόσωπον· ἀπρόσωπος δὲ ὁ δοῦλος.* There seems to be no valid reason why a novative promise by a slave should be void, unless the

4 quas licet ex ipsius lectione apertius cognoscere. Hoc amplius eae obligationes, quae consensu contrahuntur, contraria voluntate dissolvuntur. nam si Titius et Seius inter se consenserunt, ut fundum Tusculanum emptum Seius haberet centum aureorum, deinde re nondum secuta, id est neque

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same was true of all his promises by stipulation : but that this was not so is shown by Dig. 46. 1. 56. 1 cited on Tit. 19. 6 supr.

The rule that, if the parties to the new contract are the same, a novation ensues only if it contains 'novi quid', holds only where the novated obligation was itself verbal. If it had been otherwise, novation would have been disabled from discharging one of its most valued functions, viz. the substitution of obligations pursued by actions stricti iuris for obligations enforceable only by actio ex fide bona. The Proculians were of opinion that the adiectio or detractio of a surety in the new contract was not sufficient to support a novation, Gaius iii. 178.

For condicio and dies see on Tit. 15. 2 and 4 supr.

Servius Sulpicius had held that a conditional stipulation novated an unconditional contract whether the condition was fulfilled or not. Gaius (iii. 179) thought that the old contract subsisted until the condition of the new one was fulfilled, but suggests that if the creditor sued upon it before such fulfilment he might be met by exceptio doli or pacti, and this was soon recognised as law, Dig. 23. 3. 50; ib. 83; 12. 1. 36; though Labeo (Dig. 23. 3. 80) had thought otherwise.

Among the praesumptiones or evidence upon which the jurists relied to prove that there was animus novandi was, according to the Sabinian school, the addition of a surety (cf. Dig. 2. 14. 30. 1); for the presumptions against such intention see Dig. 46. 2. 6 pr. and 1; 45. 1. 58. Justinian's own enactment is in Cod. 8. 42. 8; his statement that, unless the intention to novate was express ('nisi ipsi specialiter remiserint quidem priorem obligationem et hoc expresserint, quod secundam magis pro anterioribus elegerint' Cod. loc. cit.), the two obligations should subsist side by side is apparently subject to the qualification that when one was fulfilled the other was ipso facto extinguished; see Dig. 46. 2. 8. 5.

§ 4. When the res was no longer integra, an agreement between the parties to be off their bargain did not merely extinguish the obligation : it rather operated as a new contract which bound the one in whose favour performance had taken place to restore the other in statum quo, but which was unable to injuriously affect rights acquired under the previous contract by third persons : '[re secuta] non tam hoc agitur, ut a pristino negotio discedamus, quam ut novae obligationes constituantur' Dig. 2. 14. 58.

Among the modes 'quibus obligatio tollitur' described by Gaius is the commencement of an action, litis contestatio, which, if the action were a iudicium legitimum, and the formula was in ius concepta, produced a quasi-novative effect, termed by the commentators novatio necessaria; the very delivery of the formula in the action by the praetor

pretio soluto neque fundo tradito, placuerit inter eos, ut discederetur ab emptione et venditione, invicem liberantur. idem

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to the iudex extinguished the defendant's debt, and substituted for it a new obligation, viz. the legal liability to be condemned if the plaintiff proved his case, Gaius iii. 180, 181: iv. 107. It differed, however, in its operation from novatio proper (novatio voluntaria), for it left the original obligation subsisting naturaliter, Dig. 12. 6. 60 pr., and, as a consequence, did not destroy accessory rights, such as guaranties, hypothecs, etc., Dig. 46. 2. 29. Of this process-consumption, as it is called, there are still traces in the Corpus iuris, but the general rule under Justinian is that litis contestatio no longer extinguishes the creditor's right, Bk. iv. 13. 10 inf., Cod. 3. 1. 13. 2 and 5; 3. 10. 1 pr. It must indeed have ceased to extinguish it ipso iure with the disappearance of iudicia legitima under Diocletian, A. D. 294; but now indeed it no longer enables it to be counteracted ope exceptionis; an obligatio is destroyed, not by the bringing of an action, but only by its adjudication, so that we cease to read of the exceptio rei in iudicium deductae, which is swallowed up in the exceptio rei iudicatae, Cod. 8. 41. 28: see on Bk. iv. 13. 5 inf. Novatio necessaria is also said by Gaius to be produced by judgment, sententia, res iudicata; for its effects, which do not belong here, see Poste's Gaius, p. 421.

Among modes of extinction operating ipso iure, which are not here noticed by Justinian, are physical impossibility of performance arising ex post facto without default of the debtor, Dig. 46. 3. 92; ib. 98. 8; ib. 107: cf. note on Tit. 19. 1 supr.; and in some cases death of one of the parties to the contract, as in societas (Tit. 25. 5 supr.) and mandatum (Tit. 26. 10 supr.): cf. Gaius iii. 120, Dig. 4. 8. 32. 3, and Bk. iv. 12. 1 inf., which is important for a large class of obligations arising ex delicto. The operation of compensatio (set-off) is a matter of some little difficulty: see on Bk. iv. 6. 30 inf. Confusio (p. 286 supr.) operated in this way if the deceased's heir was the sole debtor or sole creditor to the obligation in question, because one of the prime requirements of an obligatio, two persons, is no longer satisfied, Dig. 46. 3. 95. 2; but this would be exemplified under Justinian only when the heres, being debtor or creditor of the deceased, did not make an inventory, see p. 287 supr. Where the heir was one of two or more correal or solidary debtors or creditors of the deceased it was otherwise: see Dig. 46. 1. 71 pr. cited in Excursus VII. inf.

Of modes of invalidation whose effect is produced only ope exceptionis the most common are limitation (Bk. iv. 12 pr. and notes, inf.), capitis deminutio (note on Tit. 10. 3 supr.), beneficium competentiae arising upon a cessio bonorum (p. 390 supr.), and waiver or pactum de non petendo (Bk. iv. 13. 3 inf.) if absolute, i. e. not binding for a time only, or conferring rights upon the debtor only and not upon his heir. An informal acceptilatio was construed as a pactum de non petendo, if the creditor's intention was really to release the debtor, Dig. 2. 14. 27. 9. The obligations involved in the actiones furti and iniuriarum were dissolved

est et in conductione et locatione et omnibus contractibus, qui ex consensu descendunt, sicut iam dictum est.

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ipso iure by agreement not to sue, Dig. 2. 14. 17. 1. Transactio or compromise, by which two parties who affirm that they each have claims against the other mutually surrender somewhat of their alleged rights in order to remove uncertainty and narrow the issues, implied a pactum de non petendo, Cod. 2. 4. 17; ib. 24. The same result ensued from compromissum, an agreement to refer a dispute to arbitration, Dig. 4. 8. 13. 1.

EXCURSUS IV

ORIGIN AND DEVELOPMENT OF BONORUM POSSESSIO

Serious speculation on this subject commenced about a century since with Hugo, who held that bonorum possessio was in origin the system applied in the succession to aliens by the praetor peregrinus, from whose edict it was gradually transferred to that of his urban colleague. But this, though at first sight an attractive hypothesis, seems untenable on account of the tenderness which the praetor almost ostentatiously showed for the civil law and the agnatic conception of kinship: a gentile system of inheritance would more probably have been based on cognation only. Niebuhr connected bonorum possessio with the possession of ager publicus (p. 338 supr.), with the succession to which alone he thought it was originally concerned; but his view is inconsistent with the very name *bonorum* possessio, and has practically nothing in its favour. A third theory, which originated in 1837 with Fabricius, finds the germ of the institution in the judicial regulation of Possession as preliminary to an hereditatis petitio, which was tried in the centumviral court by the procedure of sacramentum, and of which a prominent feature was the award of possession pending the proceedings (Gaius iv. 16, 17). Such an award would be a provisional determination of the right of inheritance, and it is suggested that it was so often accepted by the other litigant as substantial justice that the possession came to be more than interim possession, and tended more and more to be regarded as an independent and impregnable interest. Such bonorum possessio was iuris civilis adiuvandi gratia; but as the praetor's quasi-legislative activity extended itself the forms iuris civilis supplendi and corrigendi gratia were gradually added. Savigny and Huschke connect the praetorian scheme of succession in origin with the old usucapio pro herede (Gaius ii. 52–56), of which, according to them, the praetor laid hold as the starting-point of his innovations: he gave the possession to certain persons who (it was admitted) had an equitable, though not a legal, right to the estate, and devised, in the interdict quorum bonorum, a remedy by which they could recover the deceased's property from other possessors,

thus placing them in a position to become owners by usucapion; the practical assimilation of the bonorum possessor to the heir, and the introduction of the possessoria hereditatis petitio, being due to the identification of bona fide possession in most respects with bonitarian ownership. But this hypothesis fails to give any explanation of the bonorum possessio iuris civilis adiuvandi gratia, which is on all hands regarded as the earliest form of the praetor's intervention, and seems in other ways to harmonise ill with the general history of the Roman law of inheritance.

It would seem that more light is thrown on the solution of the problem by a consideration of the oldest evidence which we possess of the law regulating the devolution of a deceased man's property on intestacy. The Twelve Tables enacted, 'Si intestato moritur, cui suus heres nec escit, adgnatus proximus familiam habeto. Si adgnatus nec escit, gentiles familiam habento.' Here the term 'heres' is confined to the deceased man's agnatic descendant: he merely assumes on the ancestor's death the actual control of property of which his ownership was previously in a state of suspended animation (note, p. 351 supr.). The law does not give him the inheritance; it recognises it to be his already. On the other hand, the nearest agnate and the gentiles are not called 'heirs' at all: all that is said is, in the absence of sui heredes, 'familiam habento': they acquire nothing ipso iure, but must take possession in order to make their title good, whereas it is clear that the suus heres had possession as heir, without the necessity of any act on his part.[1] It is a familiar rule that extranei heredes acquired the inheritance only by acceptance, and there is no doubt whatever that under the earlier law such acceptance was required in all cases to be formal and solemn (cretio); the cretiones with which readers of Gaius are acquainted seem to have been inserted in the will mainly for the purpose of compelling the instituted heir to accept within a reasonable interval.[2] The formula of acceptance was 'adeo cernoque': it had to be uttered before witnesses in the domicile of the deceased,[3] and therefore clearly involved a physical taking possession of the family estate or other property.

In the law of Attica similar principles prevailed, but the extranei

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[1] Hence when there was a suus heres in existence usucapio lucrativa was ipso iure excluded; the inheritance was already possessed.

[2] Thus Ulpian (Reg. 22. 27) defines cretio as 'certorum dierum spatium quod datur instituto heredi ad deliberandum, utrum expediat ei adire hereditatem necne'.

[3] Voigt, XII Tafeln, ii. p. 372, note 12.

heredes could obtain possession of the inheritance only by application made to and granted by the archon.[1] It is most interesting to observe that very frequently the circumstances of a Roman succession showed the advantages of the Attic rule, and suggested the adoption of a similar practice. In the Greek system, if there was a suus heres, his right was indisputable, and he was at once in possession of the inheritance, for in that case the father could not make a will. It can scarcely be doubted that originally the Roman rule was the same, at any rate in respect of family property (familia); the Twelve Tables authorised the bequest only of the individual property or pecunia. But if there was no suus heres, there could well be a question as to who was entitled to succeed the deceased: for there might be a will, and between the heir named in the will, and those who would take on intestacy a keen controversy might easily arise; and it was for the avoidance or settlement of such disputes that the Attic law laid down the rule that the extraneous heirs could obtain no valid possession save from a magisterial award. It seems more than probable that the praetorian bonorum possessio was designed to meet a similar difficulty. The Edict of Cicero's time appears to have run as follows: SI DE HEREDITATE ambigitur et tabulae testamenti obsignatae non minus multis signis quam e lege oportet ad me proferentur, secundum tabulas testamenti potissimum possessionem dabo. si tabulae testamenti non proferentur, tum uti quemque potissimum heredem esse oporteret, si is intestatus mortuus esset, ita secundum eum possessionem dabo. cum hereditatis sine testamento aut sine lege petetur possessio, si qua mihi iusta causa videbitur esse, possessionem dabo.[2] Where, in other words, there was no suus heres (si de hereditate ambigitur), but a dispute arose between extraneous heirs of different classes, the actual possession could not be obtained by a cretio, but only by magisterial decree: and the origin of the praetorian system is found in a desire to assist the extraneus heres in getting actual possession of the universitas as against wrongful possessors: 'hereditatis autem bonorumve possessio, ut Labeo scribit, non uti rerum possessio accipienda est: est enim iuris magis quam corporis possessio' (Ulpian in Dig. 37. 1. 3. 1). In its earliest form it is iuris civilis adiuvandi gratia.

The development of the system iuris civilis supplendi gratia is

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[1] Leist, Gräco-italische Rechtsgeschichte, pp. 81 sqq.: F. Schulin, Das griechische Testament, etc. 1882.

[2] Leist, Der römische Erbrechtbesitz in seiner ursprünglichen Gestalt, 1870, i. p. 76.

probably connected with other peculiarities of the old civil law. If the nearest agnate would not take the inheritance, it is well known that the more remote members of the same class had no right to it, nor, according to the Twelve Tables, had the gens: *si adgnatus nec escit*, gentiles familiam habento. It is conjectured that the same rule applied if the testamentary heir made no aditio: the inheritance remained 'iacens'. No doubt here the usucapio pro herede opened a door for the admission of the deceased man's kinsmen, but its operation was arbitrary, and perhaps often benefited persons who had no real title whatever. Hence there is much to be said for the hypothesis that it was to meet this case that (after dealing with the will) the edict continued 'si tabulae testamenti non proferentur, tum uti quemque potissimum heredem esse oporteret, si is intestatus mortuus esset, ita secundum eum possessionem dabo'. Connected with this doubtless was the fixing of a time within which application for the bonorum possessio must be made, and (more important still) the arrangement of possible successors in classes according to order of priority: 'successorium edictum idcirco propositum est, ne bona hereditaria vacua sine domino diutius iacerent' (Ulpian in Dig. 38. 9. 1 pr.). If the testamentary heir did not apply for a grant of possession within the prescribed interval, those entitled on intestacy might obtain it, though their grant would be invalidated by his subsequent cretio in accordance with the terms of the will, for that would make him heir: but supposing no cretio were made, the bonorum possessor would become heir by the operation of usucapion. It is in this form that we get the first example of bonorum possessio iuris civilis supplendi gratia. Even however as early as the time of Cicero the edict concluded with a general clause by which the praetor declared his intention of granting possession at his discretion to persons who had no civil title whatever, and Gaius (iii. 33) tells us that he made free use of his power: 'adhuc alios etiam complures gradus facit in bonorum possessionibus dandis, dum id agit, ne quis sine successione moriatur.' Some forms of the institution were due to the decay of principles of the old civil law. Thus, when the disinherison of sui heredes was once allowed, the notion that such heirs were ipso iure in possession of the inheritance became obscured, and bonorum possessio unde liberi made its appearance: and similarly the doctrine that by formal cretio the extraneous heir acquired possession of the inheritance slowly lost ground, so that possession secundum tabulas became constantly more common. By some such gradual growth the praetorian reforms at length assumed the

character of an independent scheme of inheritance, which its authors did not hesitate eventually to prefer to the civil law where justice seemed to require it, and with the bonorum possessio iuris civilis corrigendi gratia, which in Cicero's day was quite unknown, the system was complete.[1]

[1] Upon the whole subject see Sohm, Institutionen, § 97, pp. 423–436 in the English translation by Ledlie.

EXCURSUS V

THE GENERAL NATURE OF OBLIGATIONS

THE term obligatio properly indicates a legal relation between two definite persons, whereby the one (creditor) is entitled to a certain act or forbearance on the part of the other; 'creditorum appellatione non hi tantum accipiuntur, qui pecuniam crediderunt, sed omnes quibus ex qualibet causa debetur: ut si quis cui ex empto vel ex locato vel ex ullo alio debetur. Sed etsi ex delicto debeatur, mihi videtur posse creditoris loco accipi' Dig. 50. 16. 11 and 12. The contrast between it and the relation existing in the case of ownership, possession, or other legal rights, is well marked by Paulus in Dig. 44. 7. 3 pr. 'obligationum substantia non in eo consistit, ut aliquod corpus nostrum, aut servitutem nostram faciat, sed ut alium nobis obstringat ad dandum aliquid, vel faciendum, vel praestandum', with which may be compared Bk. iv. 6. 1 inf. 'namque agit unusquisque aut cum eo, qui ei obligatus est . . . quo casu proditae sunt actiones in personam . . . aut cum eo agit qui nullo iure ei obligatus est, movet tamen alicui de aliqua re controversiam, quo casu proditae actiones in rem sunt'. No better explanation of this contrast can be found than Austin's exposition of the difference between rights in rem and rights in personam, the merit of which, however, is marred by his use of the term obligation to denote the duty corresponding to rights of the former as well as of the latter class.

But though this is the proper and normal meaning of the term, obligatio is sometimes used in other senses, and more especially to express one or other limb of the relation in contradistinction to the other; thus, it signifies the right of the creditor only in the common phrase adquirere obligationem (Bk. iii. 28, Dig. 45. 1. 126. 2; 23. 3. 46 pr.: cf. Bk. ii. 2. 2 supr.), and the duty of the debtor only in Dig. 12. 1. 36; 46. 3. 95. 3, as well as in the definition given in Bk. iii. 13 pr. supr. Sometimes it denotes specifically the act or event from which the relation arises, as in Cod. 11. 47. 22. 2, as well as in the expressions verborum obligatio, litterarum obligatio, etc. Again,

though only a person can properly be ‘ obligatus ’, objects which are pledged are occasionally spoken of by analogy as subject to an obligation, e. g. Bk. iii. 27. 2 supr., Dig. 20. 6. 11 : cf. 2. 14. 52. 2 ; 13. 7. 27 : and lastly, in Cod. 4. 30. 7, the term bears the meaning of a bond or document attesting an obligation.

The earliest Roman conception of obligation is exemplified by the condition of the debtor under the form of contract known as nexum. His person was subjected to the will of the creditor, and unless he duly performed what he had undertaken his creditor took possession of him, and might even take his life or sell him into foreign slavery. But the lex Poetelia forbade the body to be taken in execution, save where a judgment debt remained unsatisfied, and the idea of obligation in the later Roman jurisprudence is rather the partial subjection, in law, of one person's will to that of another ; the partial limitation of the debtor's freedom of action in favour of the creditor.[1] If I engage to buy 1000*l*. Consols, I am no longer at liberty to buy railway stock with the same money : I must take the Consols, or (which comes to the same thing) I must pay damages : ‘ debitor intellegitur is, a quo invito pecunia exigi potest ’ Dig. 50. 16. 108 ; the prominent conception is that expressed in the ‘ necessitate adstringimur ’ of the definition of obligation in the Institutes. As Savigny remarks, the relation of obligation to personal freedom resembles that of servitude to dominium : it is, as it were, so much deducted from the ideal whole. But, as he also points out, the restriction must be partial only ; if a man's freedom is not merely curtailed in favour of another, but absolutely resigned, this is not obligation, but slavery.

The object or content of an obligation is an act or forbearance ; the debtor is bound either to do or not to do. The nature of this act or forbearance requires some elucidation.

(1) The current Roman classification of the possible objects of obligation is that suggested by the passage of Paulus cited above, into dare, facere, and praestare : cf. Gaius iv. 2 ‘ in personam actio est . . . cum intendimus dare, facere, praestare oportere ’. But the precise meaning of these terms, especially of the two latter, is so much a matter of dispute that it appears hardly worth while to

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[1] ‘ Before the lex Poetelia performance of what was due was merely the price paid for discharge from one's bonds : the true right of the creditor appeared simply as a ius in corpore : but after that statute the obligation acquired an independent existence, and the person of the debtor became merely a security for its performance.’ (Kuntze, Excurse, p. 525.)

consider the various attempts which have been made to attach a determinate signification to each of them. It is obvious that this is not a scientific classification, and it originated, in point of fact, in the technicalities of pleading under the formulary system, apart from which it is not easy to understand: under Justinian it is a mere valueless survival of an older and obsolete procedure.

(2) The act or forbearance must have an appreciable money value in relation to the creditor, 'ea enim in obligatione consistere, quae pecunia lui praestarique possunt' Dig. 40. 7. 9. 2. This rule originated in the fact that under the formulary procedure the remedy in a personal action was always damages; there was no specific performance, and if, on the debtor's refusal to do that to which he was bound, the creditor's only means of procuring satisfaction was to obtain a pecuniary condemnation, an obligation which could not be represented in a money value was clearly no obligation at all. There are writers, however, who deny the application of this principle under Justinian, on the ground that its original reason had disappeared along with the introduction of specific performance, but the better opinion would seem to be, that specific performance had never been introduced at all; others distinguish between obligations stricti iuris and bonae fidei (Bk. iv. 6. 28 inf.), holding that in the latter regard was paid to the feelings no less than to the purse of the creditor, while in the former the purse alone was considered.

(3) The object of the obligation must be possible of performance both in nature and by law (see Bk. iii. 19. 1 and notes), e. g. no duty would arise from a promise to convey a res extra commercium; but one can be validly bound to perform an act at present impossible in the event of its becoming possible (Dig. 45. 1. 98 pr.); further, it must not be unlawful, Dig. 45. 1. 26, ib. 27 pr.

(4) The act or forbearance must be sufficiently definite, or at least capable of being rendered so; e. g. one cannot be bound to do just so much as and no more than one pleases, Dig. 45. 1. 94, 95, ib. 115 pr.

The classification of obligations according to the mode in which they originate meets us in Bk. iii. 13. 2, and is spoken of in the notes to that passage; another division, of great prominence in Roman law, requires some explanation. An obligation is none the less an obligation merely because the creditor is unable to enforce it by action; there are other modes in which the duty may be discharged besides this, so that the relation fails only in one of its most ordinary incidents. Actionability is only one of such usual

incidents, though perhaps the most characteristic of all, and an obligation does not lose its legal character by reason of its absence only. Such non-actionable obligations are said to be ' natural ', in contrast with those which are ' civil ', i. e. enforceable by action; in Dig. 46. 3. 95. 4, the bond is called vinculum aequitatis, as being imposed by equity, though the precise relation of the ' nature ' implied in a natural obligation, and the nature whose law is identified by the jurists with equity and the ius gentium, is somewhat obscure. That the jural recognition of such obligations originated in the ius gentium seems to be affirmed in Dig. 50. 17. 84. 1 ' is natura debet, quem iure gentium dare oportet, cuius fidem secuti sumus ', though by some writers it is ascribed to natural law in a philosophical rather than a legal sense.

Some obligations are natural ab initio; in other words, an act or event produces a natural obligation, which under other circumstances would have been civil: there is a reason why in the particular case the creditor is unable to sue. Two such reasons have a very extensive operation, viz.—

(1) Insufficiency of form in contracts. We shall see that in Roman law agreements were actionable only if they were clothed in a definite form, or belonged to one or other of certain classes specially favoured; exactly as in English law no promise is legally binding unless made either under seal or for valuable consideration. Agreements which neither belonged to the favoured classes, nor were expressed in the proper form, were nuda pacta, and unactionable, although (according to Savigny and many other writers) they gave rise to a natural obligation enforceable in other ways. This is inferred in particular from Dig. 2. 14. 7. 4 ' igitur nuda pactio obligationem non parit, sed parit exceptionem ', ib. 1 pr. ' huius edicti aequitas naturalis est: quid enim tam congruum fidei humanae, quam ea, quae inter eos placuerunt, servari ', Dig. 46. 3. 5. 2 ' . . . puta, quaedam earum [usurarum] ex stipulatione, quaedam ex pacto naturaliter debebantur: . . . et sicut ex pacti conventione datae repeti non possunt '; cf. Dig. ib. 95. 4. On the other hand, the passage last cited is the only one in which the effect of producing natural obligation is directly attributed to a mere pact; and on account of this insufficiency of evidence there are many who hold that Savigny is not justified in affirming natural obligation as an incident of nuda pacta in general. Most directly they are supported by Dig. 45. 1. 1. 2 ' si quis ita interroget, dabis? responderit, quidni? et is utique in ea causa est, ut obligetur. Contra si sine verbis adnuisset, non tantum autem

civiliter, sed nec naturaliter obligatur, qui ita adnuit: et ideo recte dictum est, non obligari pro eo nec fideiussorem quidem'. It is perhaps more correct to say that a pact could give rise only to an exceptio.

(2) A person's defective capacity of right or disposition, or the peculiar relation of the parties. Thus, between pater and filiusfamilias, between persons subject to the same potestas, Dig. 12. 6. 38, and between master and slave, there could be natural obligation only, and even to an extranea persona a slave could not be bound civiliter; Dig. 12. 6. 13 pr. The SC. Macedonianum (Bk. iv. 7. 7 and notes inf.) affords another example: a disputed case is that of contracts made by a pupillus without his guardian's auctoritas: see on Bk. i. 21 pr. supr.

Sometimes, moreover, an obligation which was originally civilis ceased to be actionable, and became naturalis. (*a*) In some cases the praetor, on principles of equity, disregarded strict civil law rules so far as to permit the survival, in a 'natural' form, of an obligation which had iure civili ceased altogether to exist, e. g. where a creditor became heir to his debtor, and in capitis deminutio, 'hi qui capite minuuntur, ex his causis, quae capitis deminutionem praecesserunt, manent obligati naturaliter' Dig. 4. 5. 2. 2; this, however, ceased to be of importance when in integrum restitutio of the creditors had become usual under such circumstances, see p. 385 supr. (*b*) Other illustrations are supplied by the law of procedure: for example, an obligation continued to exist as naturalis after it had ceased to be actionable through either the rules for the limitation of actions, or the operation of litis contestatio (Gaius iii. 180) or res iudicata, Dig. 12. 6. 60 pr.; 46. 2. 29; Cod. 8. 41. 28.

The legal effects of natural obligation have as yet been defined only negatively; it did not entitle the creditor to sue. As to its positive effects, no general rule can be laid down for all cases: they must be determined for each case individually, for the creditor's right, in one instance, may have a greater or less orbit than in another; in other words, apart from the right of action, a natural obligation may possibly entitle him to all or any of the rights which he would have were the debtor bound civiliter, or possess all or any of the following properties:

(1) It excludes condictio indebiti (note on Bk. iii. 14. 1), i. e. if money is owed naturaliter only, and is paid, even by mistake, it cannot be recovered on the ground that it is not due: 'naturales obligationes non eo solo aestimantur, si actio aliqua earum nomine

competit, verum etiam cum soluta pecunia repeti non potest' Dig. 46. 1. 16. 4.

(2) It can be set off against an actionable claim of the debtor on the creditor, e. g. if A owes B 10*l.* naturaliter, and B owes A 20*l.* civiliter, B on being sued by A can set the 10*l.* off against the 20*l.*, though he cannot directly sue for it himself: 'etiam quod natura debetur venit in compensationem' Dig. 16. 2. 6; cf. Bk. iv. 6. 39 inf.

(3) It forms a sufficient basis for those other rights which can only come into existence under the condition that there is already an actual obligation in esse, viz. pledge, Dig. 20. 1. 5; guarantee ('ac ne illud quidem interest, utrum civilis an naturalis sit obligatio, cui adiciatur fideiussor' Bk. iii. 20. 1; so too, with constitutum, for which see on Bk. iii. 20. 9), and novation (Bk. iii. 29. 3, Dig. 39. 5. 19. 4); by constitutum a natural can be converted into a civil obligation by a mere formless second promise by the debtor, Dig. 13. 5. 1. 7.

(4) Deductio de peculio. Contracts between a paterfamilias and his filius, or between a master and his slave, produced natural obligations only, which, if the inferior had a peculium, discharged themselves by their operation on the latter, which was automatically diminished by the deduction of what he owed the superior, Dig. 15. 1. 9. 2–4.

In Bk. iii. 29 there is a discussion of the modes in which obligations could be extinguished: but this seems the most convenient place for briefly describing those in which they could be transferred. To this question there are two sides; either the right may be transferred, or the liability. Transference of the liability, if by that we understand a transaction which entirely releases the person who has hitherto been liable, and imposes the debt on some one else, could (apart from universal succession) be effected only by novatio (Bk. iii. 29. 3), which, when employed for this specific purpose, was called expromissio, though the term does not seem to be confined to this particular species of novation (e. g. Dig. 23. 3. 36), or by an act of a similar character, defensio. Transference of the right also (except in cases of universal succession) could at first be effected only by novatio. This, however, is not assignment, but substituted agreement; the assent and co-operation of the debtor is required, and the right does not pass from the person entitled to some one else, but is cancelled on condition of a new one being created in favour of the latter: see Gaius ii. 38. The Romans, in fact,

struggled, with a tenacity equalled only by that of the English Common Law, against the assignment of what we call choses in action, i. e. rights in personam ; but while the reason alleged for his resistance by the English judge was the evil of ' maintenance ', the Romans, with more lawyer-like instinct, based their opposition on the character of an obligation as an essentially *personal* relation, the parties to which could not be changed without destroying its existence.[1]

A rude species of assignment became possible after the introduction of the formulary procedure, under which plaintiffs were generally permitted to conduct their suits through agents (Gaius iv. 82). If A, creditor against B, debtor, wished to assign his right to C, he could make the latter his agent, cognitor or procurator (in rem suam) ; C thereby became entitled to accept performance from B, or in default to sue him in A's name, the condemnation being expressed in his own (Gaius iv. 86, 87). The result, in the Roman view, was no transference of the obligation, for A remained the true and only creditor ; all that passed was the right of action, or rather the capacity to exercise another's right of action, and all that C asserted or realized was the claim of another person. This cessio nominum or actionum, as it was called, though it dispensed with the necessity of the debtor's assent, was not only rude, but faulty, especially if made for valuable consideration. The appointment of C, as A's procurator, was governed by the usual rules of mandatum, and consequently became void (Bk. iii. 26. 9 and 10) if before action brought either assignor or assignee died, or if the former revoked his commission ; there was no legal relation between assignee and debtor until litis contestatio had been reached in proceedings taken by the former, so that until then the creditor could himself receive performance, make an acceptilatio, or appoint a new agent. At length this was obviated by the assignee being allowed (1) to secure to himself the benefit of the obligation, even before bringing an action, by giving the debtor notice of the assignment, Cod. 8. 41. 3, and (2) to sue, not in the assignor's name, but in his own by actio utilis (Ulpian in Dig. 3. 3. 55, Cod. 4. 15. 5 ; 6. 37. 18), which he was enabled by gradual changes to do not only where he had been expressly appointed agent, but also in cases of a mere alienatory disposition (Cod. 4. 10. 2, Dig. 2. 14. 16 pr.), and even where strictly speaking the assignment would have been avoided by death or

[1] Cf. Mr. Justice O. W. Holmes' Common Law, pp. 239, 341.

revocation (Dig. 3. 3. 55, Cod. 4. 10. 1; 8. 54. 33). It is disputed whether the effect of the change was to make the assignee sole creditor, or whether, in relation to the debtor, he did not still legally continue a mere agent, enforcing by action in his own name the right of another; in other words, whether a genuine assignment, by which the assignee simply and actually stepped into the shoes of his assignor, who simultaneously dropped altogether out of the matter, was recognised at any time in Roman law. This, however, is too minute and complicated a question to be entered upon.

For such assignment no form was prescribed. It could be effected (1) by any expression of intention, unless it was of such a legal character as to be invalid if not accompanied by certain solemnities (e.g. donatio, p. 235 supr.); (2) by judicial sentence, e.g. in an actio familiae erciscundae, Dig. 10. 2. 3. If a defendant were ordered to transfer a chose in action, the judge might add that unless the order were obeyed the assignment should be taken to have actually been made; (3) in pursuance of a general rule of law (cessio legis), e.g. a person who procures the rescission of a will by querella inofficiosi can recover legacies paid by the testamentary heir, Dig. 5. 2. 8. 16; cf. 19. 1. 13. 25.

The following rules of assignment are deserving of notice, if only for the close parallelism between some of them and those of English law:

(1) Until the debtor has received notice of the assignment, he is at liberty to treat the assignor as his true creditor; thus he is released by payment to him ('ille, cuius nomen tibi pignori datum est, nisi ei cui debuit solvit nondum certior a te de obligatione tua factus, utilibus actionibus satis tibi facere compelletur, quatenus tamen ipse debet' Cod. 8. 17. 4), and is not prejudiced if (before notice) he allows the creditor to set the claim off against a converse one of his own, Dig. 18. 4. 23. 1. Opinions differ as to the necessity of express notice by the assignee himself. Many writers add that successive and competing assignees rank, as against the debtor, in the order, not of the assignments, but of the notice; but this is denied by others, and seems to be unsupported by textual authority.

(2) After notice the debtor is no longer entitled to treat the assignor in any way as his creditor, and, if sued by him, is protected by exceptio: Dig. 2. 14. 16 pr.

(3) The right passes to the assignee with all the defects and all the advantages incident to it while vested in the original creditor. So far as the former are concerned, this may be expressed by saying

that the assignment takes place ' subject to equities ', Dig. 18. 4. 5, i. e. the assignee can ordinarily be met by the same defences as might have been urged against the original creditor at any moment before notice of the assignment was received, except such as are purely personal (e. g. the exceptio pacti de non petendo, if available only against the releasor). Among the advantages incident to the chose in action which pass with it are rights of security, both real and personal, and unsatisfied claims to interest ; the assignee may deal with it as if he himself had been creditor ab initio : e. g. he may assign it afresh, release it, or use it as a set-off.

(4) In respect of certain assignments for valuable consideration, there is an important enactment of Anastasius (lex Anastasiana, Cod. 4. 35. 22), to the effect that no purchaser of a chose in action should be able to recover more from the debtor than what he had paid himself, with ordinary interest, even though it was alleged that the transaction was in part a gift. So far as the actual debt exceeded the purchase money, it was ipso facto cancelled. We may also notice a constitution of Theodosius and Honorius forbidding the assignment of obligations to more powerful persons than the assignor, Cod. 2. 13. 2, and one of Justinian prohibiting tutors and curators from becoming assignees of claims against their wards, Nov. 72. 5.

The Romans did not carry their theory of assignment beyond the actio utilis ; for although it is true that the assignee's right to sue was often, and perhaps usually, attested by a cautio or bond of the debtor, transferred by the assignor for evidentiary purposes, yet this cautio was no embodiment of the right after the fashion of negotiable instruments in modern law, which are exempt from the rules relating to notice and equities. As Mr. Poste remarks (Gaius p. 407), ' the complete transferability of obligations was unknown to jurisprudence until modern legislation gave validity to contracts with an incerta persona, i. e. with a person unascertained except as a member of a class ; in other words, to papers payable to the holder or bearer.' The nearest approach to be found in Roman law to this modern refinement of transferability is the imposition of an obligation on the successive holders for the time being of a parcel of land : ' imperatores Antonius et Verus rescripserunt, in vectigalibus ipsa praedia, non personas conveniri, et ideo possessores etiam praeteriti temporis vectigal solvere debere, eoque exemplo actionem, si ignoverint, habituros ' (i.e. against their predecessors).

EXCURSUS VI

DOLUS, CULPA, AND CASUS

A PARTY to an obligation, whether it arise ex contractu or quasi ex contractu, may commit a breach of duty, express or implied, either intentionally or unintentionally. Deliberate breach (dolus) always entailed liability—dolus semper praestatur—which could not be evaded even by an explicit agreement to the contrary: 'Celsus putat non valere, si convenerit, ne dolus praestetur: hoc enim bonae fidei iudicio contrarium est: et ita utimur' Dig. 50. 17. 23: cf. Dig. 2. 14. 27. 3. Certain unintentional breaches were treated in the same manner, whether consisting in acts of commission or of omission: viz. those which arose from want of ordinary care, from a carelessness so excessive that no ordinary man would have been guilty of it: this is called culpa lata, and for it, even in contractual and quasi-contractual relations, one is always answerable no less than for dolus, or deliberate and intentional breach: 'lata culpa est nimia negligentia, id est, non intellegere quod omnes intellegunt' Dig. 50. 16. 213. 2: ib. 223 pr., 'lata culpa plane dolo comparabitur' Dig. 11. 6. 1. 1, 'prope dolum est' Dig. 17. 1. 29 pr., 'dolum repraesentat' Dig. 47. 4. 1. 2, 'dolus est' Dig. 50. 16. 226.

But if a man's negligence or culpa is not of this extreme degree, the question whether he is answerable for it is determined by reference to one or other of two standards or criteria of carefulness, the one abstract or absolute, the other relative or concrete.

(1) In some relations a man is required to show what the Romans call exacta diligentia, or the diligentia of a bonus paterfamilias, a careful, circumspect, sound man of business; here he is answerable for all culpa, provided it would have been avoided under the circumstances by a man of that kind: 'culpa autem abest si omnia facta sunt quae diligentissimus quisque observaturus fuisset' Dig. 19. 2. 25. 7. Modern writers call this culpa levis in abstracto: in the authorities it is usually called culpa simply: when it is said that a man is answerable not only for dolus but for culpa as well, what is meant is that he is answerable for levis culpa: the liability for lata

culpa, being universal, is implied. Instances in which this highest degree of diligence was demanded are those of the commodatarius, Bk. iii. 14. 2 ; the depositor, Dig. 47. 2. 61. 5 ; the pledgee in a pignus, Bk. iii. 14. 4 ; the vendor, Dig. 18. 6. 3 ; the hirer (conductor), and letter (locator), Dig. 19. 2. 31 ; the authorized agent (mandatarius), Cod. 4. 35. 13 ; and unauthorized agent (negotiorum gestor), Bk. iii. 27. 1. A person who undertook by stipulation to convey property (dare) is apparently liable for culpa only if he disables himself by his own express act from executing his promise : but if the promise was of anything else, it would seem that the judge had power to require from him the care of a bonus paterfamilias, Dig. 45. 1. 137. 3.

(2) In other relations the law was satisfied with a less rigid standard : i.e. a man was required to be only as careful as he was in affairs which concerned no one but himself, or in which he himself would be the person primarily injured by carelessness : 'talem praestare diligentiam qualem in suis rebus adhibere solet ;' or, as modern writers say, he was held answerable only for culpa levis in concreto. This lower degree of carefulness only was demanded from the depositary (Dig. 16. 3. 32 : see note on p. 397 supr.) ; the tutor, Dig. 27. 3. 1 pr. and curator ; partners (socii) inter se, Dig. 17. 2. 72, Bk. iii. 25. 9 ; coheirs and colegatees, Dig. 10. 2. 25. 16 ; and the husband in respect of the dos, Dig. 23. 3. 17 pr. If one may lay down a general rule, it would perhaps best be formulated thus : in contractual and quasi-contractual relations the defendant is usually required to show exacta diligentia, but the burden of proving his negligence is on the plaintiff ; in some of them, however, the defendant is excused if *he* can prove that he has shown such diligence and care as he usually displays in the conduct of his own affairs, provided the carelessness is not 'lata'.

Mr. Poste, in his note on this subject (Gaius pp. 452–454), criticises as unnecessary and complicated the tripartite division into the diligence (*a*) of an ordinary man, (*b*) of a man in his own concerns, and (*c*) of the bonus paterfamilias, and adopts the two last criteria only. The result of this is a faulty determination of culpa lata, which he defines as 'the absence of the degree of diligence which a man habitually bestows on his own concerns' ; that this is wrong is clear from the definition cited above from Dig. 50. 16. 213. 2. Hence too arises a practical difficulty : for if we suppose (e. g.) a partner to be less careful in suis rebus than an ordinary man, and yet to display in societatis rebus that care which he bestows on his

own, how is he to be judged? He has been guilty of culpa lata according to the definition of the Digest, and yet on Mr. Poste's principle he is not answerable.

No test has yet been suggested for determining the degree of diligence required by law in a given relation which is not marred by perplexing exceptions. Perhaps the one which covers the greatest number of instances is that proposed by Mr. Poste, p. 453: 'the degree of diligence required of a man in any relation, and the standard by which he is judged, depend generally on the question whether he is benefited or not benefited by the relation:' 'in contractibus bonae fidei servatur, ut si quidem utriusque contrahentis commodum versetur, etiam culpa, si unius solius, dolus malus tantummodo praestetur' Dig. 30. 108. 12: cf. Dig. 13. 6. 5. 2. Yet there are some cases (e.g. mandatum and negotiorum gestio) in which, though the relation is all for the interest of one party, exacta diligentia is required from the other; and others in which, though both parties are interested, they are yet expected to show only talem diligentiam qualem in suis rebus adhibere solent, e. g. partners, coheirs, and colegatees.

The term custodia is sometimes used to denote the care which a contracting party has to take in the charge of an object: but it is also used, in a more technical sense, of a higher responsibility which could only be undertaken by express contract to that effect. See note on p. 435 supr.

Accident, fortuitus casus (which is mentioned in Bk. iii. 14. 2 and elsewhere in the Institutes), and dolus form the two extremes of a chain of possible sets of circumstances, the responsibility for which may be exhibited thus. For accident, and for such unintentional faults and mistakes as could not have been guarded against by the utmost care, no one is answerable. Culpa levis entails liability on the classes of persons enumerated under (1) supr.: they are required to show exacta diligentia. The classes of persons enumerated under (2) are expected to display the lower degree of diligence: they are answerable for culpa levis in concreto. Culpa lata and dolus entail liability in every case.

The liability for culpa in delict is treated in Bk. iv. Tit. 3, and notes.

EXCURSUS VII

JOINT AND SEVERAL LIABILITY. CORREALITY AND SOLIDARITY

The simplest type of obligation is that in which there is but a single creditor and a single debtor. There may, however, possibly be two or more creditors, or two or more debtors, in the same obligation. Sometimes, it is true, this plurality of parties is apparent only, and not real: it is seen, on a closer scrutiny, that there are, in reality, a number of separate obligations, each with its single creditor and its single debtor, and each distinguishable from each of the rest: the misapprehension arising from the fact that there is something which connects the several obligations with one another. For instance, if A, B, and C jointly promise 15*l*. to D, or if D promises 15*l*. to A, B, and C jointly, D can claim only 5*l*. from each of the promisors singly, or each of the promisees can recover only 5*l*. from him. Or again, if a debtor or creditor dies, leaving several joint heirs, they are entitled or bound, and can sue or be sued, only in the ratio of their shares in the inheritance. In all these cases there is no single obligation with a plurality of parties on either the creditor or the debtor side: there is a number of separate and distinct obligations, which, in our minds, are connected together by the unity of the mode in which they originate.

A different form of apparent unity of obligation is that, where two or more persons are entitled or bound in the sense that each may claim, or be called upon to perform, the whole of what is due under the obligation, that whole being demandable as many times as there are creditors or debtors respectively. E. g. the law imposes a penalty of 10*l*. on any one who steals pheasants' eggs. A, B, and C together go and steal D's pheasants' eggs: D can recover the 10*l*. penalty from each of the three in succession, exactly as if he were the only delinquent, or as if the thefts were independent or disconnected. Roman law supplies an illustration in Dig. 9. 2. 11. 2 'ex lege Aquilia quod alius praestitit alium non relevat, cum sit poena'. So too if D injures A, B, and C by the same act, they can each separately recover from him the penalty fixed by law: the obligations are independent, though arising from one and the same source.

But a third case is conceivable. There may be one creditor entitled by different obligations against two or more debtors, or one debtor

bound by different obligations to two or more creditors ; but these obligations, though different from one another, may have one and the same object (act or forbearance) : not similar objects, such as the payment of the 10*l*. penalty above, but the same object : so that when that object is once attained by the performance of one of the obligations, all the rest, no longer having any object, cease ipso facto to exist. E.g. A, B, and C jointly break my windows. Each is under a separate obligation to pay me for mending them, and I may sue which I please, apart from the rest, for the expenses to which I have been put ; but if I recover the amount of the glazier's bill from A, I can no longer get it from B or C, for the claim is a civil one for compensation, not a quasi-criminal one for a penalty. In such a case, there are as many separate obligations as there are persons bound, but the object of all these obligations is the same : each debtor is, therefore, liable for the whole object, or liable in solidum (as distinct from the liability pro parte exemplified by a joint promise to pay 15*l*.), but as the object is only one, it can only be once attained, and therefore performance by one of the joint debtors releases the rest. This is called solidary obligation : and as two or more debtors can be solidarily bound to one creditor (passive solidarity), so two or more creditors can be solidarily entitled against one debtor (active solidarity) ; i. e. either or any one of them can, without consulting the other or rest, claim the whole object (which forms the connecting link between the different obligations) from the single debtor ; but as soon as he has done what he has to do for one, the vinculum iuris between him and all is severed, and he is free. The predominance of passive over active solidary obligation is so great that some writers have supposed the latter to have no real existence. There is a clear case of it, however, in Dig. 9. 4. 14 pr., though owing to its rareness we need not concern ourselves with it here.

Cases of the passive form are (1) the joint commission of a delict : the obligation of the co-delinquents to make compensation (though not that to pay a penalty) is solidary, Dig. 2. 10. 1. 4 ; 4. 2. 14. 15. (2) The liability of cotutors for dolus and culpa in the discharge of their functions, Dig. 16. 3. 1. 43 ; 26. 7. 18. 1 ; 27. 3. 1. 13. (3) Where two or more persons jointly incur a contractual but not correal (for which see below) liability (e. g. A and B jointly agree to act as agents for C, Dig. 17. 1. 60. 2 ; or as his depositaries, Dig. 16. 3. 1. 43 ; or jointly borrow a thing for use, Dig. 13. 6. 5. 15), they are bound solidarily in respect of the duties which arise from the contract. Such joint contracts will not, however, in themselves create

active solidary obligation, Dig. 16. 3. 1. 36; ib. 14 pr. (4) In mandatum qualificatum (Bk. iii. 26. 5) joint mandators incur solidary liability if the debtor is unable to pay himself, Dig. 46. 1. 52. 3: so too with constitutum debiti alieni (note on Bk. iii. 20. 8). (5) Where one room is jointly occupied by two or more persons they are liable in solidum to the actio de effusis et deiectis, Bk. iv. 5. 1 infr., Dig. 9. 3. 1. 10; ib. 2–4.

Solidary obligation is terminated—i. e. all the solidary debtors are released, and the right of all the solidary creditors is extinguished—by simple satisfaction of the sole creditor, or by satisfaction of one of the creditors by the single debtor. This may occur (1) by performance, solutio, or (2) by set-off extending to the whole of the debt. But acquittal of one solidary debtor in an action brought on his obligation did not release the rest from theirs: 'plures eiusdem pecuniae mandatores, si unus iudicio eligatur, absolutione quoque secuta non liberantur, sed omnes liberantur pecunia soluta' Dig. 46. 1. 52. 3. Acceptilatio (Bk. iii. 29. 1) was equally inoperative, for it is neither payment nor equivalent to it: and novatio (ib. § 3) extinguished solidary liability only so far as the object of the new obligation was quantitatively equivalent to that of the old. In short, the intervention of any event, which ordinarily destroys an obligation, between the creditor and one of the joint debtors, or between the debtor and one of the joint creditors, does not affect the liability of the other debtors, or the right of the other creditors, unless it is or amounts to performance.

But, though the ultimate liability of each of several solidary debtors for the whole object of the obligation is clear, each ordinarily enjoyed the following rights: (*a*) except where he had been guilty of dolus, or of culpa in excess of the rest, he could claim to be primarily sued only for an aliquot part of the debt, Dig. 26. 7. 38 pr.: he could be called upon to pay more only if the rest or some of them were insolvent (beneficium divisionis). (*b*) If another or others of the debtors had been excessively in fault, he could in some cases (e. g. cotutors, Dig. 26. 7. 3. 2; ib. 39. 11; ib. 55. 2) demand that he or they should be sued before him (beneficium ordinis sive excussionis). (*c*) Where he had not been guilty of dolus (Dig. 27. 3. 1. 13 and 14) and paid the whole, he had a ius regressus against the rest by which he could recover their respective shares of what he had paid. In (1) supr. this right of course did not exist: 'in pari delicto potior est condicio defendentis.'

From solidary we have to distinguish what is called correal obliga-

tion. This resembles the former, in that two or more creditors (correi stipulandi or credendi) are entitled against one debtor, or two or more debtors (correi promittendi or debendi) are bound to one creditor in respect of one and the same obligation-object, and so far we may say that every correal includes in itself a solidary obligation, each of the two or more creditors being entitled, and each of the two or more debtors being bound, in solidum. But it differs in that there is not only one obligation-object, but only one *obligation*. The unity of the object here follows necessarily from the unity of the obligation itself: where the liability is solidary, it arises from extraneous causes, for, given a variety of obligations, the natural and usual consequence would be a corresponding variety of objects.

It is thus the unity or identity of the obligation which distinguishes correal from merely solidary obligation: or, to put the matter in another form, when there is correality, there is, objectively, one single obligation, to which a variety of persons are subjectively related in solidum: and their subjective relation may be different.

There is, objectively, but one single obligation. Hence any act or event (and not merely performance or its equivalent, as in cases of solidarity) which puts an end to the objective existence of that single obligation between the creditor and one of the debtors, or the debtor and one of the creditors, extinguishes it between them all; e.g. solutio or performance (Inst. iii. 16. 1, Dig. 45. 2. 3. 1), acceptilatio (Dig. 46. 3. 16), and novatio (Dig. 46. 2. 31. 1). Compensatio, or set-off, extinguishes correal obligation only if it goes to the whole debt, Dig. 20. 4. 4: but if correal debtor A is sued he cannot set off money owed to correal debtor B, unless he and B are partners, Dig. 45. 2. 10. So, too, if the creditor sued one of the debtors, or one of the creditors sued the debtor, the obligation was extinguished for all by the action's reaching the stage of litis contestatio, Gaius iii. 180, Dig. 45. 1. 116. In respect of passive correal obligation this was altered by Justinian's constitution in Cod. 8. 41. 28, which enacted that the debt should not be extinguished by litis contestatio, but only by satisfaction of the creditor: for active correal obligation the old rule seems to have continued, Dig. 45. 2. 2; 46. 2. 31. 1. Further consequences of the unity of the obligation are that any act of a correus debendi, by which its performance becomes impossible or more difficult, prejudices the rest: 'ex duobus reis eiusdem Stichi promittendi factis alterius factum alteri quoque nocet' Dig. 45. 2. 18: as also does the interruption of prescription by one of them only.

But the subjective relation of the correi to the obligation need not

be the same. Hence, as is said in Bk. iii. 16. 2, one correus debendi may be bound ' pure ', another sub condicione : one may be entitled or bound as principal, another only as accessory, as in the case of stipulator and adstipulator, Gaius iii. 110-114, or of debitor and fideiussor, Bk. iii. 20 : or one may be in mora without prejudicing the rest, Dig. 22. 1. 32. 4 : and other events, though not destroying the objective existence of the obligation, may modify the relation to it of this or that correus. Thus, for the operation of confusio (p. 469 supr.) cf. Dig. 46. 1. 71 pr. ' sed cum duo rei promittendi sunt, et alteri heres extitit creditor, iusta dubitatio est, utrum alter quoque liberatus est, ac si soluta fuisset obligatio, an persona tantum exempta, confusa obligatione : et puto aditione hereditatis confusione obligationis eximi personam : . . . igitur alterum reum eiusdem pecuniae non liberari ' ; for capitis deminutio, Dig. 45. 2. 19 ' cum duo eandem pecuniam debent, si unus capitis deminutione exemptus est obligatione, alter non liberatur ' ; for liberatio legata (Bk. ii. 20. 13 supr.), Dig. 34. 3. 3. 3 ' si quidem mihi liberatio sit legata, ... et cum alio sim debitor, puta duo rei fuimus promittendi, et mihi soli testator consultum voluit, agendo consequar, non ut accepto liberer, ne etiam correus meus liberetur contra testatoris voluntatem, sed pacto liberabor '. Where the creditor agreed by pactum de non petendo not to sue one of two or more correi debendi, the other or rest could take advantage of the pactum only if, as it is said, it was in rem (see on Bk. iv. 14. 4 inf.), even though partners of the other, Dig. 2. 14. 25. 1, ' multum enim interest, utrum res ipsa solvatur, an persona liberetur ' Dig. 45. 2. 19, ' in rem pacta omnibus prosunt, quorum obligationem dissolutam esse eius, qui paciscebatur, interfuit ' Dig. 2. 14. 21. 5. Hence the pactum de non petendo in rem of one correus debendi benefits the rest whenever on payment by one of them he would have regressus against the others, for otherwise the pactum would be practically inoperative. But if, conversely, one of two or more correal creditors concluded a pactum de non petendo with their joint debtor, the latter could in no case plead it in defence to an action instituted by the other or others : ' si unus ex argentariis sociis cum debitore pactus sit, an etiam alteri noceat exceptio ? Neratius, Atilicinus, Proculus, nec si in rem pactus sit, alteri nocere : tantum enim constitutum, ut alter solidum petere possit ' Dig. 2. 14. 27 pr.

Correal obligation might arise (1) from contract, usually stipulation in the form given in Bk. iii. 16 pr., though it seems to have been also possible, first to make an ordinary stipulation, followed by another in

which the same performance was promised by the same promisor to another promisee, or to the same promisee by another promisor (e.g. adstipulatio and fideiussio): in bonae fidei contracts correal obligation could be produced by a pactum adiectum directed to this purpose, Dig. 16. 3. 1. 44; 45. 2. 9; (2) from testament, by the testator charging a legacy on one or other of his heirs in the alternative, Dig. 30. 8. 1; 32. 25 pr. To create an active correal obligation by will the testator must state this as his intention explicitly. (3) The obligation was also correal in the cases of express or implied agency pursued by the actiones adiectitiae qualitatis, de peculio, de in rem verso, quod iussu, exercitoria and institoria (see note on Bk. iv. 7 pr. inf.). (4) In a banking partnership the socii were liable correally on all their business transactions, whether entered into by one or all of them, Dig. 2. 14. 9 pr.; 4. 8. 34 pr.; see on Bk. iii. 25. 9. (5) Joint owners of a slave who committed a delict, or of an animal which did damage, were correal debtors in respect of the noxal action, Bk. iv. 8 inf.: Dig. 9. 1. 1. 14; 9. 4. 8; 11. 1. 7, ib. 8, ib. 20 pr.

It appears to be the better opinion that a paying correal debtor had not, as such, a ius regressus against the rest (Dig. 35. 2. 62 pr.; cf. Tit. 20. 4 inf.), unless he and they were partners, Dig. loc. cit., or unless, and here only so far as, they had been benefited by the debt which he had discharged, Cod. 8. 40. 2. Savigny contends (Obl. §§ 23–25) that the ius regressus existed in all cases, on the ground that a correal debtor, when sued, could always meet the plaintiff by exceptio doli, unless the latter consented to transfer to him his rights of action against the other correi debendi, and that, when such a cessio could be insisted upon, utiles actiones were in the later Roman law always granted under the fiction that it had actually been made. But that the so-called beneficium cedendarum actionum belonged to every correal debtor as such who paid is far from certain: nor is Savigny's other assumption correct, that in every case in which it did exist a fictitious cessio was recognised: for though a paying fideiussor could insist on an actual cessio, it is certain that, apart from it, he had no regressus against cosureties, Gaius iii. 122, Bk. iii. 20. 4 supr., Dig. 46. 1. 39, Cod. 8. 41. 11.

The beneficium divisionis, or right to be sued for only an aliquot share of the debt, belonged to correi debendi only in particular cases, and by special enactment: it was granted to fideiussors by the epistola Hadriani, Bk. iii. 20. 4, and from these was extended to mandators, Cod. 4. 18. 3: Justinian gave it to persons jointly liable on a constitutum, Cod. ib. The effect of Nov. 99 on this branch of law is too much a matter of dispute to admit of discussion.

EXCURSUS VIII

THE ROMAN LITERAL CONTRACT AND ITS HISTORY

The true old Roman literal contract, commonly called expensilatio, which apparently began to be disused soon after the fall of the Republic, was concluded by the creditor's making, with the debtor's assent, an entry in his domestic account-book or ledger (codex, tabulae) of so much as advanced by him to the latter (expensum ferre), the transaction thus having the appearance of an advance or loan. Such a written entry was not mere evidence of a contract binding on some other ground—res, verba, or consensus: by itself it laid the debtor under a legal obligation to repay the sum in question: 'in nominibus alius *expensum ferendo* obligat' Gaius iii. 137. There are at least two passages (Cic. ad Att. 4. ep. 18, Valerius Maximus 8. 2. 2) which prove that expensilatio was a mode of creating a new and original obligation. But it seems most ordinarily to have been employed for the purpose of Novation (Bk. iii. 29. 3), when apparently it was called transcriptio, and the entry 'nomen transcripticium' Gaius iii. 128: and in the form transcriptio a persona in personam ('veluti si id quod mihi Titius debet, tibi id expensum tulero' Gaius loc. cit.), it must among business men have been of great value in the simplification and settlement of outstanding accounts. The main object of transcriptio seems to have been the substitution of a strict civil law for a iuris gentium contract; or, as Mr. Poste puts it, 'to metamorphose claims recoverable by actions ex fide bona, e. g. locati conducti, empti venditi, which in many points favoured the defendant, into debts recoverable by the short and sharp remedy of the civil action of condictio, which, when brought for certa pecunia credita, was the more formidable to a dishonest litigant, as it was accompanied by a sponsio poenalis, whereby the vanquished party forfeited a third of the sum in litigation, in addition, if he was the defendant, to the original claim.' That this was its main use seems more than probable on *a priori* grounds, for it is clear that if 30*l.* are due to a man on a sale (e.g.), he will prefer to secure by novation a remedy by which he can recover 40*l.*; and the conclusion is made absolutely certain by a consideration of the only

case in which a iuris gentium contract was not 'novated' by entry in the codex. Gaius tells us (iii. 131) that the entry of a genuine money loan left the transaction a mutuum or real contract, though known by the specific name of nomen arcarium. The explanation of this seeming anomaly is that the remedy on mutuum alone of all the real and consensual contracts was always condictio: and as consequently novation of a mutuum by transcriptio could give the creditor no advantage which he did not possess already, its entry in the ledger did not alter the 'causa' of the obligation, but served only as evidence, Gaius loc. cit.

Expensilatio, as has just been remarked, was a formal civil law contract, confined to Roman citizens, though the Sabinians had held that for transcriptio a re in personam at least it might be used also by peregrini. We learn, however, from Gaius that the latter had a form of literal contract of Greek origin peculiar to themselves, viz. the chirographa and syngraphae, species of bonds of which the former were signed by the debtor only, while the latter were executed in duplicate, and signed by both parties. It seems clear, from the passage referred to (iii. 134), that, unless made merely as evidence of a stipulation, these had binding force for peregrini in themselves, though they would not have bound citizens: or, as Savigny says (verm. Schriften i. p. 246), it was law in the provinces, as contrasted with Rome, that any formless document attesting an agreement was actionable.

Asconius, the early commentator on Cicero, observes (in Verr. 2. 1. 23) that in his time the codex, and with it expensilatio, had gone out of use except among bankers (argentarii), who, as might have been expected, continued longer to keep their books in the old Roman fashion, though Justinian says in Bk. iii. 21 that in his own day such entries, even supposing them to have still been made, had ceased to create obligations. Whether it be true or not, as Asconius (confirmed by Eusebius) says himself, that he wrote about the middle of the first century of our era, the commentary on the Verrine orations is of so different a character from the rest that Savigny and Niebuhr may be right in ascribing it to a *rédacteur* of the fourth century, in which case the fact that Gaius describes literal contract as apparently in full operation need create no difficulty. Perhaps, indeed, as was first suggested by Schüler, the disappearance of nomina transcripticia is to be ascribed to the introduction of constitutum, which, instead of novating the pre-existing obligation, added to it a fresh one upon which the creditor, if successful, would recover an even heavier penal

sum than he would by condictio certi (p. 429 supr.), and which was superior to them in its simplicity and formlessness.

But, even long before the time of Gaius, the character of expensilatio (with which, as a formal contract, stipulatio may be co-ordinated) had been vitally altered. These two contracts had for centuries resembled the English Deed in imposing an obligation by their mere form: once made, the debtor was bound, and must pay, whether he had or had not received the consideration for which he purported to have made the promise or consented to the entry, and even though his promise or consent had been obtained by duress, misrepresentation, or undue influence. It would seem that this was remedied first in 65 B. C.[1] when Gallus Aquilius, Cicero's colleague in the praetorship, stated in his Edict that he would allow an exceptio doli mali to be pleaded in defence to an action on a formal contract. In contracts which were bonae fidei such a formal plea was unnecessary: for 'doli exceptio inest bonae fidei iudiciis' Dig. 24. 3. 21; and in a condictio brought on a mutuum the defence of no consideration would be a direct traverse of the plaintiff's right, upon whom consequently would fall the burden of showing that the money had in point of fact been advanced to the defendant. Mr. Poste (Gaius, p. 368) seems to think that the exceptio doli was not universally pleadable to condictiones until the time of Marcus Aurelius; but the passage in the Institutes (Bk. iv. 6. 30) upon which this supposition is based relates only to the application of this plea in the introduction of a set-off (compensatio) in such suits. It is obvious that Aquilius' innovation entirely changed the material character of stipulatio and expensilatio. Ostensibly, they continued to bind in virtue of their form alone: practically, as fraud, failure of a promised consideration, &c. would enable the promisor, by pleading exceptio doli, to defeat any action brought against him by the other party, they were 'transformed into real (?) contracts, the obligation of the promisor depending on the performance of the promisee (re), that is, on the execution by the promisee of his part of the consideration, not on the solemnity of the spoken words (verbis) or written documents (literis)'.

Eventually, when the defendant's plea was in effect that the promised pecuniary consideration, by which his own promise had been obtained, had not, in point of fact, been given (i.e. when it was in

[1] In the first edition this change was attributed to a praetor named Cassius on the strength of Dig. 44. 4. 4. 33: but this seems to have been erroneous: see Prof. Muirhead's Roman Law, addition to p. 448.

factum composita), it came to be called the exceptio pecuniae non numeratae, which Justinian says in the Code is a species of the exceptio doli, with which indeed it is in Cod. 4. 30. 3 actually identified: cf. notes on Bk. iv. 13. 1 and 2 inf. From a comparison of Gaius iv. 116 with those paragraphs it would seem that the new name had not yet been given in the former's time. Upon the plea of pecunia non numerata being entered by the defendant, the onus probandi, contrary to the ordinary rule, lay upon the plaintiff: 'si ex cautione tua, licet hypotheca data, conveniri coeperis, exceptione opposita seu doli seu non numeratae pecuniae, compellitur petitor probare pecuniam tibi esse numeratam: quo non impleto absolutio sequetur' Caracalla in Cod. 4. 30. 3.

From a careful examination of Bk. iv. 13. 2 inf., it is clear what was in the minds of the compilers of the Institutes when they wrote their Title 'de litterarum obligatione'. One man obtains from another an instrument, amounting to a stipulation (Bk. iii. 19. 12 and 17), promising payment of a sum of money, by means of an unactionable undertaking of his own to lend him a similar sum, which is not fulfilled. The instrument (or rather the stipulation of which it is the proof) binds the promisor in law, although he has not received the consideration for it; but when he is sued upon it, his plea of pecunia non numerata throws on the plaintiff the onus of proving that the money was really advanced. Persons who were so careless as to put their names to such memoranda without having received the consideration for which they purported to have been given, were at first allowed to plead the exceptio, so as to throw the onus of proof on the plaintiff, only within one year from their date: this was extended by M. Aurelius (Cod. Herm. 1) to five years, which Justinian, as he says in Bk. iii. 21, again reduced to two. After this interval—in the language of that passage, dum queri non potest—the instrument was accepted as presumptive evidence that the money had been advanced, or other consideration given, so that the defendant might be said, in a sense, to be litteris or scriptura obligatus; for the rule as to the onus of proof was now reversed: the plaintiff had not to prove that he *had* lent the money, but the defendant had to prove that he had not. But persons who had incautiously given such notes would still have been largely at the mercy of their holders, had the latter been able to wait till the interval, within which the exceptio could be pleaded, had elapsed, and then to sue with the advantage of having shifted the onus probandi on to their opponents. To prevent this the former could either bring condictio ob causam

datorum, compelling the holders to prove the alleged consideration, or in default to deliver up the memoranda (Cod. 4. 30. 7), or protest in the acta of a court against their validity, or make their exceptio perpetual by serving a formal written notice on the creditor, Cod. ib. 14. 4.

Justinian, before whose legislation the exceptio pecuniae non numeratae could be used only where default had been made in the advance of money by the plaintiff, gave it a larger scope by allowing it also where the alleged consideration was the conveyance of other things: 'in contractibus, in quibus pecuniae vel aliae res numeratae vel datae esse conscribuntur, non intra quinquennium, quod antea constitutum erat, non numeratae pecuniae obicere possit, qui accepisse pecunias vel alias res scriptus sit, vel successor eius, sed intra solum biennium continuum' Cod. 4. 30. 14 pr. Justinian's attempt to pass off the instrument as a 'literal' contract, which is due merely to the habit of reproducing, if possible, the arrangement and terminology of Gaius, is forced and unhappy: the notion of an obligation arising simply litteris does not appear elsewhere in the Corpus iuris, except so far as the use of scriptura and litterae in Dig. 44. 7. 2. 1; ib. 38, and 46. 2. 17 may be regarded as a reminiscence of the old expensilatio. The instrument itself does not bind: it is merely evidence, and what does bind is the stipulation which it attests—or as Paulus puts it neatly in Dig. 44. 7. 38 'non figura litterarum, sed oratione, quam exprimunt litterae, obligamur'. The fact is that the compilers of the Institutes, in working through the earlier work of Gaius, incautiously transcribed the whole of iii. 89, and consequently when they had finished the subject of stipulation felt bound to make some sort of a show of a 'literal' contract. In the Digest, which was meant for practitioners, more than for students, no such mistake was made. There we read (44. 7. 1. 1) 'obligationes ex contractu aut re contrahuntur aut verbis aut consensu'. It need hardly be said that beyond all doubt Gaius, who is the author of the passage, added 'aut litteris' after 'verbis', and that these two words were struck out as antiquated by the commission of compilation.[1]

[1] Justinien affirme, dans ses Institutes, qu'il existe, à son époque, une obligation littérale : celle produite par un titre qui constate mensongèrement un prêt et dont la sincérité ne peut plus être contestée parce que le délai de la querela non numeratae pecuniae est expiré. On admet aujourd'hui assez habituellement, avec raison à notre sens, qu'il fait là une confusion entre la formation de l'obligation et sa preuve, et que même il la fait probablement d'une façon consciente afin de pouvoir conserver, malgré la disparition du codex, la division des obligations contractuelles en obligations nées re, verbis, litteris et consensu : Girard, 4th ed., p. 500.

EXCURSUS IX

AGENCY

THE question of contractual agency or representation is this: to what extent, if any, was it possible for B (not being a mere messenger or 'animated letter', but a genuine agent, allowed more or less discretion) to make a contract with C for A, so that (assuming of course that B discloses the fact of his agency and his principal's name, and does not exceed his instructions)

A alone acquires rights against and can sue C?

C acquires rights against and can sue A only, and

B neither acquires rights nor incurs liabilities under the contract?

The principle of the old civil law was that the only person who became entitled or bound under a contract was the person who made it, whether he acted for himself or as agent for some third party. The only exception of any importance arose from the proprietary incapacity of persons in potestas, manus, and mancipium: all benefit arising from contracts made by these vested in their domestic superior, because it could not vest in them; so that if A wished to make a contract in which he should be creditor through an agent, he need only get a slave or filiusfamilias of his own to stipulate; whether he stipulated for himself or for his superior was immaterial. The operation of this, however, as a form of agency must have been slender, as the superior could not be bound by the inferior's promises, and therefore it was inapplicable to the dispositions of everyday life, such as sale and hire, all of which give rise to bilateral obligation.

How did the matter stand, if the agent employed was an 'extranea persona'? It has been pointed out, on Bk. iii. 19. 4, that (with a few exceptions) B could not make a contract with C for A and in A's name, so as to entitle the latter against C: and the case in which B is A's agent is not one of those exceptions. Consequently, if it is wished to create an obligation at all, it is essential that B should first make the contract in his own name, for if he said he was merely acting for A, and that he made no promise for himself, nor intended to acquire any right for himself, the contract would be void; to confer any right on A he must take further measures, shortly to be noticed. Against this view, however, Savigny (System iii. 95 sq.; Oblig. ii.

40 sq.), followed by Mr. Poste on Gaius iii. 103 and 162, maintains that, with the exception of stipulation, the only formal contract surviving in Justinian's time, B could make any contract for A in the latter's name, so as to confer rights on him alone and enable him alone to sue. This is based on Dig. 41. 1. 53 'ea quae civiliter adquiruntur per eos qui in potestate nostra sunt adquirimus, veluti per stipulationem : quod naturaliter adquiritur, sicuti est possessio, per quemlibet volentibus nobis possidere adquirimus'. But in this passage, as has been remarked by many writers, it is probable that its author, Modestinus, wrote mancipationem, not stipulationem, which the compilers of the Digest substituted for it as being the only old formal disposition surviving in their day ; and it is clear, from its position in the Title 'De adquirendo rerum dominio', that it does not relate to contracts at all, but only to the question whether anything more than possession in a res corporalis could be acquired per extraneam personam : see note on Bk. ii. 9. 5 supr. But after all, perhaps the best criticism of this theory of Savigny's is that of Dr. Hunter, that if the Roman law had really attained to a true conception of agency, the fact must have been patent in many texts ; whereas in point of fact its author is unable to support it by any really pertinent textual authority, except the very doubtful passage last cited.

Consequently, the agent must make the contract in his own name : and the desired effect—the conferring of rights, and the imposition of duties, upon his principal—was first attained only after the introduction of the formulary procedure (Gaius iv. 86, 87) and in a very cumbrous and circuitous manner. If (e. g.) A, being at Rome, wished to buy a house belonging to C at Naples, he would give B (at Naples) a mandate to buy it for him. B does so, and then assigns his rights against C to A, i. e. makes him his procurator in rem suam (cf. p. 482 supr.) ; C's rights against B, e. g. his claim for the purchase money, can be made available against A only by a novatio : if this is not done, C, if necessary, must recover from B by actio venditi, and B from A by actio mandati contraria. Here none of the conditions above specified are realized. A, so far from alone acquiring rights against C under the contract, acquires them only indirectly as his own agent's assignee ; C acquires rights against A, if at all, not by the contract of sale, but by the novation to which A is himself a party ; and B is in fact the principal and true vendee throughout, and the only person who is entitled and bound in that capacity. In short, the desired effect is not attained simply by A's making B his agent, but by a double mandatum and a novatio : A makes B his

agent for the proposed purchase from C: B buys the house: B then assigns his rights against C to A (result, A alone is entitled against C); A and C then novate B's debt to C by A's promising by stipulation to pay it in lieu of B: (result, C is entitled against A alone).

After becoming B's assignee, the principal (A) at first sued only in B's name, but later he was allowed to sue in his own by actio utilis (see p. 482 supr.), though his right of action arose only upon an actual cessio, which however, if necessary, he could extort from B by actio mandati: 'evictionis actio domino contra venditorem invito procuratore non datur, sed per actionem mandati ea cedere cogitur' Dig. 41. 2. 49. 2. There is one passage which appears, in direct contradiction to this, to affirm that the principal could sue apart from any assignment; 'quod procurator ex re domini, mandato non refragante, stipulatur, invito procuratore dominus petere potest' Dig. 3. 3. 68; but here most of the commentators are agreed that a 'non' has slipped out between petere and potest; and even without resorting to this textual emendation one may suppose the passage to mean 'whether the agent likes it or not the dominus can sue, because he can compel him to make an assignment of his rights of action'. Mainly upon the strength of this passage, however, Savigny (Oblig. i. 243 sq.; cf. Poste's Gaius, note on iii. 162) has built up a theory that wherever a cessio could be compelled, it was implied or feigned to have actually taken place: *ergo* the principal could always sue by actio utilis without the necessity for any actual assignment of the right of action: but this has very slender textual authority, and is denied by most of Savigny's most eminent successors. It would seem that the only cases in which an actio utilis was granted to the principal without actual cessio (and that only causa cognita, after an inquiry into the facts) are where the principal is a soldier, Dig. 12. 1. 26, where the agent is acting for a person 'praesens' in the sense explained on Bk. iv. 11. 4 inf., Dig. 45. 1. 79; where the agent makes stipulations before the magistrate, Dig. 46. 5. 5, and finally in special cases where otherwise the principal would be seriously prejudiced, Dig. 14. 1. 1. 18.

As for the liabilities arising from the contract made by the agent with a third party, none of these directly affected the principal by the civil law at all. He was indirectly answerable for them, because after they had been satisfied by the agent the latter could sue him by actio mandati contraria for all expenses he had incurred: but if he came to stand in a direct obligatory relation with the third party, he did so only in virtue of an express contract between himself and the

latter, producing a novation of the agent's debt, not under that which the agent had made on his behalf. How far this was altered by the praetor when the agent was his slave or filiusfamilias is explained more fully in Bk. iv. Tit. 7 inf. But where a shipowner (exercitor) appointed any one, whether in his power or not, as captain (magister) of his ship, the praetor made him directly liable in full, by actio exercitoria, upon all business contracts made by the magister as his agent, e.g. insurances, loans for repairs, &c., Bk. iv. 7. 2 inf. The same rule was applied by the praetor when one appointed another, whether in one's power or not, as one's institor, i.e. to manage a trade or business for one, e. g. as merchant, tailor, banker, &c.; the principal was made directly liable, by actio institoria, on all contracts entered into by the institor in the ordinary course of the business. And eventually, if the contract which the agent made for the principal did not fall within the scope of either of these two remedies, the latter was made directly liable in every case by the action called quasi-institoria or institoria utilis, Dig. 14. 3. 19. pr., neither of which names, however, is classical. Finally, if the agent exceeded his commission, and the principal was benefited by the unauthorized contract, he was directly suable pro tanto by the praetorian action de in rem verso, Dig. 15. 3: Cod. 4. 26. 7. 1: Dig. 17. 2. 82. All four actions belong to the class known as actiones adiectitiae qualitatis, because they were subsidiary or additional to the natural remedy against the true contracting party; for though by these changes the principal had been made directly liable, the agent had not therefore been exonerated; the third party, who contracted with him, had the option of suing whichever he pleased, the agent by direct action on the contract, or the principal by actio adiectitiae qualitatis, these two being in fact correi debendi; 'est autem nobis electio, utrum exercitorem an magistrum convenire velimus' Dig. 14. 1. 1. 17, 'item si servus meus navem exercebit, et cum magistro eius contraxero, nihil obstabit quominus adversus magistrum experiar actione, quae mihi vel iure civili vel honorario competit: nam et cuivis alii non obstat hoc edictum, quominus cum magistro agere possit: hoc enim edicto non transfertur actio sed adicitur' Dig. ib. 5. 1: and it does not seem to be true, as some maintain, that the agent's liability ceases as soon as he is no longer agent, or is limited by the extent of the principal's assets.

INTRODUCTION TO BOOK IV

THE first five Titles of this Book relate to the two classes of Obligations which have not yet been treated, namely, those which arise from Delict and quasi ex delicto. These, we are told, are all of one character: that is to say, the existence of the obligation does not depend in different cases on different 'causae', in the sense in which, for instance, Sale is binding so soon as the parties have agreed upon the price, while Exchange produces no vinculum iuris until there has been performance on one side; but their 'causa' is always the same, viz. a wrongful act (res), upon the commission of which the obligation at once springs into existence. Of such wrongful acts four have specific names, and are called Delicts: Theft (furtum), Robbery (rapina), Injury to property (damnum), and wilful Injury to the person or reputation (iniuria).

The precise differentia of Delict, as compared with other forms of legal wrong, and the reason why some of these offences—notably Theft and Robbery—were ever treated by the Romans as civil wrongs at all, are topics upon which something is said in the commentary below. The text of the first Title deals with Theft. The definition of this, as the deliberately wrongful dealing with (moveable) property, is contrasted with our own English treatment of the offence by its width and generality. It is Theft not merely to appropriate what one knows to belong to another, but to barely use a thing of which one has undertaken the custody or which one holds in pledge, to turn what has been lent one to a use which it is not believed the lender would have sanctioned, or even to deprive another of the possession of an object which one has delivered to him as security for money owed.

The Romans divide the offence into two orders, according as the delinquent is or is not detected in its commission; the penalty in the first case being a mulct of four times, in the second one of twice the value of the property stolen: besides this, the person injured can by an independent action recover either the property itself or its value. Certain obsolete varieties of Theft, punished under the older law by penalties quantitatively differing from these, are incidentally noticed; the liability of instigators and accessories is accurately determined by illustrations; the necessity of Intent to constitute

the offence is dwelt upon ; and finally there is an examination of the question, what interest will suffice to enable a person to bring the penal action.

Robbery (Title 2) implies Theft ; the injured person consequently may proceed by either actio furti or bonorum vi raptorum, though the latter, being praetorian, was, so far as it was penal, barred by limitation in an annus utilis. The distinction between the two offences is that Robbery is always accompanied by violence ; there is also a difference in the nature of the remedy, by which, should the offence be treated as rapina, both penalty and compensation are simultaneously recovered, whereas the actio furti is penal only, compensation being obtained by condictio furtiva. A stringent enactment of Valentinian is here noticed, which was designed to check violent seizure of property, moveable or immoveable, under the pretence that the seizor believed it to be his own ; a plea which excluded the presumption of dolus malus, and consequently exempted him from the penalties of both Theft and Robbery. It is also observed that to enable one to sue on the latter one's interest in the property may be even more slender than is required to support an actio furti.

The third Title treats of the lex Aquilia, an early statute which practically contains the whole of the law of Injury to property, damnum iniuria datum. The peculiarity of this Delict is that mere negligence is sufficient to render one liable to its penalties : 'non minus quam ex dolo ex culpa quisque hac lege tenetur.' What amounts to negligence in this connection is clearly shown by a series of illustrations. The lex Aquilia contained three chapters, the second of which was obsolete under Justinian. The first dealt with the killing of slaves and certain domesticated animals, and imposed a penalty of the highest value such slave or animal had borne at any time within the year immediately preceding. The third related to almost every other kind of damage to property : its penalty was such property's highest value within the last thirty days before the wrong was done. It is observed that the crude method of determining the penalty prescribed by the statute itself had been very much altered by the 'interpretatio' of the older lawyers, expanded by the commentaries of their successors under the empire : certain extensions of the statute by the action of the praetor to cases not strictly within its letter are noticed ; and the wide meaning of 'damnum' to be gathered from its terms is illustrated by examples.

The fourth Delict (Iniuria, Title 4) is aimed at the honour, good name, and reputation of a free person: it comprises such acts as assault and battery, libel, slander, and in fact all treatment of or demeanour towards a man by which his character is likely to be injured, and which is calculated to arouse resentment. It is pointed out that a wrong of this sort may be inflicted upon one in the person of one's wife, children, or slaves; for though the slave himself has no rights whatever, and therefore no good name to injure, yet the object of an attack upon him may be to dishonour his master. The penalty for this offence, originally in some cases retaliatory, had been altered by the praetor to a pecuniary mulct, which the injured person was allowed within certain limits to fix himself; the considerations upon which its amount depended were in the main his rank and the circumstances under which the injury had been inflicted, which would sometimes bring it within the category of iniuria atrox. Among minor points touched upon in the text are the bearing of the lex Cornelia upon this subject, the alternative criminal remedy, the liability of accessories and instigators, and the extinction of the actio iniuriae by dissimulatio or condonation.

The fifth Title illustrates the class of obligations which arise quasi ex delicto, and which seem mainly to be cases of vicarious responsibility, such as that of a householder for damage caused by things 'effusa et deiecta' from his residence, and of an inn or stable keeper for the delicts of his *employés*. The reason why a judge was held liable quasi ex delicto for loss occasioned to suitors by his incapacity or injustice would seem only to be that such an offence could not be brought within the definition of any of the four old established Delicts.

At Title 6 we enter upon the discussion of the last department of Private Law—the ius quod ad actiones pertinet. The division of law into law of Persons and law of Things is perhaps as old as Cicero (Invent. i. 24), and apparently was the basis of a classification in the Perpetual Edict (Dig. i. 5. 2); but Gaius, so far as we know, was the first jurist who added the third division of actiones. It may be doubted whether his own conception of this branch of his system was as clear as a more modern writer might have made it. The term actio, as is shown in the note on Tit. 6 pr., has a variety of meanings in the writings of the Roman lawyers, and two of them seem to be more or less blended in Gaius' fourth Book, which wholly relates to this topic. In one sense, actio is a right of action; and a treatise upon rights of action would correspond with what writers on analy-

tical Jurisprudence term the Law of Sanctioning or Remedial rights. In another sense actio means the Procedure in an action ; taken thus, the ius quod ad actiones pertinet would correspond to what the same writers call Adjective Law, and which it is perhaps more proper to regard as a part of the Public rather than of the Private code. The fourth Book of Gaius would seem to be an ill-arranged attempt to deal with actio in both of these aspects. It cannot be contended that it deals solely with Remedial rights : Gaius' own explanation of the term actio in his opening paragraphs shows that he is thinking of an ' action ' rather than of a ' right of action ', based, as it is, upon peculiarities of Procedure and Pleading. In point of fact a very considerable proportion of the Book deals with Procedure pure and simple : in other words, ' Procedure is treated partly indeed in its formal character, but still more in its material character : . . . that is to say, not so far as it is merely the method of realizing pre-existing rights, but rather so far as its stages are titles which, like Dispositions and Torts, themselves originate new rights and new obligations.'

The compilers of the Institutes, however, seem to have had a very inadequate conception of Gaius' scheme, and indeed to have troubled themselves very little in this part of the work to follow out consistently the principle of arrangement for which they were indebted to him. Strictly speaking, of course, all the Titles between the fifth and the end of the Book should have related to actions in some sense or other : but they seem to have considered it better to give the heading ' de actionibus ' to a single Title (6), in which all conceivable rights of action are classified upon various principles of division, and to append to this a number of subsidiary Titles dealing mostly with topics discussed by Gaius in a far closer and more logical connection with his main subject. The effect of this is to give an air of deadness to the whole treatment, and to disable the compilers from justifying the place assigned in the fourth Book to some matters for which Gaius himself might possibly have offered some reasonable defence. For instance, if it is right to describe in Book III the extent to which a paterfamilias profits by the contracts of a son in his power, or a master by those of his slave (Tit. 28), that too must be the proper place to explain what corresponding liability he incurs by them : but this is discussed in Book IV, Tit. 7, while Titles 8 and 9, though placed where they are after Gaius, would have occupied a far more logical position between Titles 5 and 6, in connection with obligations arising from Delict and quasi ex delicto. No doubt this failure to

carry out the original plan of arrangement is in a large measure to be explained by the great change which had occurred in the nature of Procedure proper between the composition of the two works. The mode in which an action was conducted in Justinian's time was so untechnical, so free from the trammels of law, and so much was left to the discretion of the judge himself, that little could be said upon the matter: the litigant was no longer liable to be wrecked by the omission of some slight form; the administration of justice had become more 'paternal', and state officials saw that he duly went through many stages in the process (or went through them for him) for which the earlier law had left him solely responsible in person. Knowledge of Procedure was therefore of less importance than in the old days, and what there was to know could be learnt less satisfactorily from books than by attending the courts, to which Justinian himself refers the student (e. g. Tit. 11. 6). Hence it is impossible to give a really connected view of the matters discussed in the last thirteen Titles of the Book which lies before us. So far as there ever was a connection between them, it is to be ascertained by systematically reading the fourth Book of Gaius, not that of his imitator.

In the sixth Title Actions are divided upon three main principles.

i. According to their content they are divided (*a*) into real and personal. A real action is one in which the plaintiff affirms a right in rem, whether dominium (§ 1) or a ius in re aliena (§ 2); in a personal action his contention is that the defendant is under some specific legal obligation to him. 'Prejudicial' actions, in which the issue usually is a question of status, may be regarded as a species of the former class: in rem esse videntur, § 13; and some actions 'mixtam causam obtinere videntur' (§ 20), i. e. are at once both real and personal; these are the iudicia divisoria, such as suits for the partition of an inheritance or other joint property, and for the regulation of boundaries. Cross divisions from this same point of view of content are (*b*) that which turns upon the plaintiff's more immediate object, according as it is to obtain mere reparation (actiones rei persecutoriae, § 17), as in real actions and those arising ex contractu; to merely recover a penalty (poenae persecutoriae, § 18), as in the actio furti; or to get compensation and penalty in one (actiones mixtae, § 19), as in the actions on robbery and under the lex Aquilia, (*c*) according to the amount of damages recovered, which may be simple (e. g. actions on contract, § 22), double (e. g. the actio furti nec manifesti, § 23), triple (§ 24) or quadruple (e. g. the actio furti

manifesti, § 25); (*d*) that which depends upon the possibility of the plaintiff's being unable to recover the whole of what is his strict legal due (§ 36), owing to the defendant's liability being merely partial or conditional on his means: examples of these are given in §§ 36–40.

ii. Actions are called legitimae or civiles if accorded by the civil law, honorariae or praetoriae if their source is merely the imperium of the magistrate, § 3. Praetorian real actions are exemplified by the actiones Publiciana, Serviana, and hypothecaria, §§ 4–7; among those which are personal are the actiones de pecunia constituta (§ 9), de peculio (§ 10), and others which are penal (§ 12).

iii. Finally, there is a division the origin of which is to be sought in the formulary period, and which turns upon the nature of the procedure. Actiones arbitrariae (§ 31) are those designed to enable a plaintiff to obtain production, restitution or delivery of specific property. Actions in personam are for the most part either stricti iuris or bonae fidei (§ 28), a distinction more fully explained elsewhere [1]; the latter class is illustrated by examples, and the extension of one of its leading features—set off—to the former is noticed in § 30.

Lastly, thrust into this classification of actions, in deference to Gaius, are one or two topics which would have been better discussed in some other place. The thirty-second section, which corresponds with Gaius iv. 52, should properly form part of Title 17 (' de officio iudicis '); and the explanation of the effects of plus and minus petitio, and of erroneous as distinct from over claim (§§ 33–35, corresponding with Gaius iv. 53–60), which really is a matter of Procedure, might be placed in several of the following Titles as appropriately as here.

In the seventh Title are explained the so called ' actiones adiectitiae qualitatis ', by which the Praetor had tempered the inequitable doctrine of the civil law that a master or paterfamilias, though entitled to all benefit under the contracts of his slaves or children in power, could in no case be sued upon them. By the actiones quod iussu, exercitoria, and institoria the superior became liable in solidum whenever it could be shown that he had directed or authorized the contract. Where a slave or filiusfamilias embarked a peculium in trade with his master's or father's knowledge, and became insolvent, the master or father was permitted to distribute the assets among the creditors, though any one of them who was dissatisfied

[1] Note on Bk. iv. 6. 28 inf.

with such distribution was enabled by the actio tributoria to bring it under judicial review: if the pater or dominus was himself a creditor, he was entitled to no larger dividend than the rest. Where, on the other hand, the slave or son made the contract without the superior's knowledge, the latter was liable in person by the actio de in rem verso so far as the transaction had resulted in a benefit to himself; otherwise he could be compelled only to surrender the peculium, and had the privilege of first deducting from it debts owed to himself in full. There is also a discussion of the relative advantages to the creditor of these different actions and of a condictio, where he has an option; and in § 7 we have a notice of the SC. Macedonianum, which refused an action upon money loans given to a child in power against the latter himself no less than against the paterfamilias.

In the following Title (8) there is a corresponding treatment of the dominus' and paterfamilias' liability on the delicts of those in their potestas. The law by which the several delicts had been constituted, whether civil or praetorian, had given the superior the option of paying damages or surrendering the delinquent, as a slave or in mancipio, to the injured person. Justinian definitely confirmed as law the usage which had grown up under the later Empire, and which limited this 'noxal' surrender to slaves: children in power were to be personally liable on their delicts, and the paterfamilias free. The maxim 'noxalis actio caput sequitur' is explained in § 5, and in § 6 there is a discussion of the effects of delicts committed by slaves against their own masters. The application of noxal surrender in the case of pauperies, or damage done by certain domesticated animals, is treated in Title 9, which also gives some account of a penal action introduced by the aedile for the redress of injuries or damage done by wild animals kept under insufficient control near places of public resort.

The Titles between the 9th and the 15th have a nearer relation to Procedure proper than the other parts of this Book, and are all closely modelled after Gaius. The first of them deals, though somewhat uninstructively, with the employment of agents or attorneys in litigation, which, originally tolerated only in very few cases, had, as Justinian remarks, become almost universally permissible under the later practice. Title 11 gives a historical account of the earlier law as to the security to be given by plaintiffs and defendants, especially when represented by such attorneys, and then proceeds to state the rules in force upon this subject under Justinian, and Title 12 discusses the active and passive transmission of rights of action,

their extinction by a longer or shorter limitation, and the right of a defendant under the maxim 'omnia iudicia absolutoria' to be acquitted if he satisfied the plaintiff's claim at any moment before judgment.

Exceptiones—a class of defences consisting in the plea of a countervailing right as distinct from a direct denial of the plaintiff's allegations—form the subject of Title 13, and are copiously illustrated in its first few paragraphs. The most important classification of them, which turns upon the energy of their operation in respect of time and persons, is then pointed out and exemplified, and the effect of a plaintiff's bringing his action before really entitled to do so, both under the old law and as regulated by an enactment of Zeno, is carefully described. The possibility of meeting a defendant's exceptio by a replicatio on the part of the plaintiff—a fencing process which might be carried to any length by duplicationes, triplicationes, &c.—is noticed and illustrated in Title 14, which concludes with a statement of the law as to how far sureties could defend themselves by the exceptiones of their principal. The subject of the 15th Title is interdicts, a class of actions relating for the most part to Possession and Quasi-possession, the acquisition and retention of which are lightly touched upon in § 5. The procedure in interdicts, which in the formulary period had been of a peculiar and complicated nature, of which some account is given in the notes, was under Justinian (as he points out in § 8) much the same as in an ordinary action. In general they are divided according as the object for which the interdict is brought is the prevention of some unlawful act, or the restitution or production of property: those which relate exclusively to possession fall into three classes, adipiscendae, retinendae, and recuperandae possessionis causa; the first kind is illustrated by the interdicta Salvianum and quorum bonorum, the second by uti possidetis and utrubi (in describing which the older procedure is incidentally touched upon), and the last by unde vi. Finally, interdicts are divided into simple and double, the latter being those in which neither party plays exclusively the *rôle* of either plaintiff or defendant; a peculiarity from which had resulted the very complicated character of their procedure as described by Gaius. This is followed in Title 16 by an account of the precautions taken by Roman law to prevent people from either beginning or defending actions without just and reasonable cause. Among these are the oath exacted from both parties and their counsel that they honestly believe their case to be a good one; the duplication of damages in some actions if the

defendant denied his liability; the association of infamia with condemnation in others; and the obligation of the losing side to pay the other's costs. The last paragraph relates to summons, and to the penalty inflicted on freedmen and children in power if they presumed to commence litigation against their patron or paterfamilias without first obtaining the praetor's permission. Title 17 explains the duties of the judge in different kinds of suits, real and noxal actions and the iudicia divisoria being selected for special treatment; and in Title 18, the Book concludes with a short account of public prosecutions, and the leading statutes by which crimes were defined, and their punishment prescribed. Treason is dealt with in § 3: adultery and similar offences in § 4: murder in § 5, and the peculiar form of it known as parricidium in § 6: forgery in § 7: violence to the person in § 8: embezzlement in § 9: manstealing and kidnapping in § 10: and a variety of minor offences punished more lightly than these in § 11.

LIBER QUARTUS

I

DE OBLIGATIONIBUS QUAE EX DELICTO NASCUNTUR

G. iii. 182. Cum expositum sit superiore libro de obligationibus ex contractu et quasi ex contractu, sequitur ut de obligationibus ex maleficio dispiciamus. sed illae quidem, ut suo loco tradidimus, **in quattuor genera dividuntur**: hae vero **unius generis** sunt, nam omnes ex re nascuntur, id est ex ipso maleficio, veluti ex furto aut rapina aut damno aut iniuria.

Tit. I. A delict is usually defined as a violation of a ius in rem which generates an obligation remissible by the private individual who is wronged. This, though it serves to distinguish delict, as a source of obligations, from contract, and as a private wrong from a crime, is insufficient when applied to Roman law. Such wrongs as the withholding of possession by a defendant who bona fide believes in his own title are not delicts, at any rate in the specific sense in which the term is used in the Institutes; they give rise, it is true, to a right of action, but a right of action is a different thing from an obligatio ex delicto: they are redressed by mere reparation, by the wrong-doer being compelled to put the other in the position in which he would have been had the wrong never been committed. But delicts, as contrasted with them and with contracts, possess three peculiarities. The obligations which arise from them are independent, and do not merely modify obligations already subsisting: they always involve dolus or culpa; and the remedies by which they are redressed are penal. From every true delict arises an obligation to pay a penalty to the person who pursues it; and from every delict which causes damnum or proprietary loss arises also an obligation to compensate the injured person for that loss. This latter obligation, though it does not enrich the person wronged, may itself be penal—as where the wrong-doer has derived little or no material benefit from the wrong, so that after making compensation he is poorer than before he committed the delict. In such cases the action is treated as a penal action; e. g. in not being passively transmissible except so far as the delinquent's property has been augmented by the wrong; Savigny proposes to term it 'unilaterally penal'. The two obligations arising from delicts which cause proprietary loss are not always pursued by different remedies; this is so in furtum, but in rapina and damnum iniuria datum both penalty and compensation are recovered by a single action, which for that reason is called mixta; i. e. it is 'tam rei quam poenae persequendae comparata' Tit. 6. 19 inf.

Furtum est contrectatio rei fraudulosa vel ipsius rei vel 1 etiam usus eius possessionisve, quod lege naturali prohibitum

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Gaius' remark (iii. 182) that all delicts are of one kind, which Justinian here explains by saying that they all ' ex re nascuntur ', means that in them the obligation is not produced (as in contracts) by different causae; it springs from the wrongful act itself, and from that alone. The use of the word 'res' (for which cf. the line cited from Terence p. 464 supr.) is unhappy, because it suggests a reference, as probably Justinian intended, to the obligations quae re contrahuntur, Bk. iii. 14 supr.; in the Digest the idea is better expressed by ' factum ' : ' ex facto actio est, quotiens ex eo teneri quis incipit quod ipse admisit, veluti furtum vel iniuriam commisit vel damnum dedit ' Dig. 44. 7. 25. 1; ib. 52. 8.

Of the four delicts here mentioned furtum and iniuria are older than the others, both being treated in the Twelve Tables, Gaius iii. 189, Tit. 4. 7 inf. Damnum iniuria datum was constituted a specific delict by the lex Aquilia, and rapina or robbery by the praetor's edict.

§ **1.** This definition requires expansion in two particulars. To rei should be added mobilis (see Bk. ii. 6. 7 supr.): and the motive must be gain; a point marked in the counterpart of the definition given in Dig. 47. 2. 1. 3 (lucri faciendi causa): cf. Dig. ib. 43. 4; ib. 65. Its terms require some elucidation. Contrectatio implies that without an 'overt act' there can be no furtum: cf. § 6 inf., and Dig. 47. 2. 52. 19 'neque verbo neque scriptura quis furtum facit, hoc enim iure utimur, ut furtum sine contrectatione non fiat'; but the nature of this overt act may be manifold, as will appear below. Fraudulosa implies unlawful intention; intention, because furtum ex affectu consistit, §§ 7 and 18 inf.; and unlawful intention, because if the person acting honestly believes that his act will not be objected to by the person wronged, it is not theft: 'si permissurum credant, extra crimen videri' § 7 inf., though whether in cases such as that of which Justinian is immediately speaking unlawful intention would not be a presumption iuris et de iure is a question. The animus lucri faciendi fails, if the wrong-doer's intention is merely to cause a damage to the other; e. g. if he takes property intending immediately to throw it into the sea, Dig. 19. 5. 14. 2; but the requirement of its presence is satisfied if the intention is not to aggrandize oneself pecuniarily, but to benefit oneself in some other way—e. g. where one steals a ring in order to make a present of it: 'nam species lucri est ex alieno largiri et beneficii debitorem sibi adquirere' Dig. 47. 2. 55. 1. The division into furtum rei ipsius—usus—possessionisve is not designed to distinguish different species of theft (for of these there are but two, § 3 inf.), but to suggest the comprehensive character of the delict, and the chief forms which the contrectatio might take. Its meaning in effect is this: the general character of furtum consists in intentionally dealing with a res mobilis in a wrongful manner, and usually the res is aliena, whether the intention be to appropriate ownership in it (ipsius rei) or merely to use it in an unauthorized manner (usus); but it is possible to commit theft on property of one's own, though to do this it

2 est admittere. Furtum autem vel a furvo id est nigro dictum est, quod clam et obscure fit et plerumque nocte: vel a fraude: vel a ferendo, id est auferendo: vel a Graeco sermone, qui φῶρας appellant fures. immo etiam Graeci ἀπὸ τοῦ φέρειν
G.iii.183. 3 φῶρας dixerunt. **Furtorum autem genera duo sunt, manifestum et nec manifestum. nam conceptum et oblatum**

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is as a rule essential that the property should be in the lawful possession of another person, the intention being to dispossess the latter (possessionis). By Theophilus furtum possessionis is understood to mean the wrongful appropriation of a thing by a person who already has possession or detention of it (ὅτε τὸ δοθὲν ἐπὶ τῷ νέμεσθαι ὡς ἐνέχυρον ἢ ὡς δεπόσιτον νέμομαι ὡς δεσπότης), in other words, the arbitrary and wrongful conversion of detention or civil possession into usucapion possession corpore et animo; but this is rather furtum ipsius rei, and Theophilus' view is discountenanced by §§ 6–10 inf.: cf. Dig. 47. 2. 74.

Furtum then may occur in any of the following ways:

(1) Theft in the popular sense: 'cum quis rem alienam invito domino contrectat' § 6; 'fur est, qui dolo malo rem alienam contrectat' Paul. Sent. Rec. 2. 31. 1.

(2) The wrongful appropriation of a res aliena which one already possesses or detains, e. g. as depositary, agent, usufructuary, etc. (cf. Theophilus supr.); of this no illustrations are given in this Title, but see Dig. 47. 2. 1. 2; ib. 33; ib. 43. 1; 16. 3. 29; 17. 1. 22. 7.

(3) The wrongful appropriation of property found, Bk. ii. 1. 48 supr., Dig. 47. 2. 43. 4–11.

(4) The mala fide alienation of a res aliena, Bk. ii. 6. 3 supr.

(5) The wilful destruction of bonds in order to destroy evidence of debt, Dig. 47. 2. 27. 3; ib. 32.

(6) The wrongful using of a res aliena of which one has possession or detention, e. g. by depositarius, pledgee, or commodatarius, § 6 inf.

(7) Furtum of res sua, § 10 and notes, inf.

For the prohibition of furtum by natural law cf. Cic. De Off. 3. 5 'illud natura non patitur, ut aliorum spoliis nostras facultates augeamus', Augustin. Confess. 2. 4. 1 'furtum certe punit lex scripta in cordibus hominum'. Among certain peoples (e. g. the Egyptians, Lacedaemonians, and Samians) theft is said to have been allowed by their own municipal law; Diodor. Sic. 1. 80, Xenophon, Rep. Laced. 2. 8, Plutarch, Lycurgus 12.

§ 2. The derivation of furtum from furvus, which is Varro's (Bk. 14) was approved by Labeo, and apparently by Paulus, Serv. ad Verg. Georg. iii. 405; that from 'fraus' was suggested by Sabinus: φώρ is connected with φέρειν in more than one old work on etymology.

§ 3. The jurists seem to have differed as to the true definition of furtum manifestum; Gaius (iii. 184) gives several proposed tests, one of which (the finding of the thief at any time with the stolen property in his actual possession, rem tenens) he says was generally rejected; while the quali-

species potius actionis sunt **furto cohaerentes quam genera furtorum, sicut inferius apparebit. manifestus fur** est, quem G. iii. 184. Graeci ἐπ' αὐτοφώρῳ appellant: nec solum is qui in ipso furto **deprehenditur,** sed etiam is qui **eo loco deprehenditur,** quo **fit, veluti qui** in **domo furtum** fecit et nondum egressus ianuam deprehensus fuerit, et qui in **oliveto olivarum** aut **in vineto uvarum** furtum fecit, **quamdiu in eo oliveto aut** in **vineto fur** deprehensus **sit**: immo **ulterius** furtum manifestum extendendum est, quamdiu **eam rem fur tenens visus** vel deprehensus fuerit sive in publico sive in privato vel a domino vel ab alio, antequam eo perveniret, **quo perferre** ac deponere rem **destinasset.** sed si pertulit quo destinavit, tametsi deprehendatur cum re furtiva, non est manifestus fur. **nec** G. iii. 185. **manifestum furtum quid sit, ex his quae diximus intellegitur: nam quod manifestum non est, id** scilicet **nec manifestum est. Conceptum furtum dicitur, cum apud aliquem testibus** 4 G. iii. 186. **praesentibus furtiva res quaesita et inventa sit: nam in eum propria actio constituta est, quamvis fur non sit, quae appellatur concepti. oblatum furtum dicitur, cum res furtiva** G. iii. 187. **ab aliquo tibi oblata sit eaque apud te concepta sit, utique si**

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fication of this with which Justinian adopts it (that he must not yet have conveyed it where he intended), though accepted by Sabinus (Gellius 11. 18. 1), caused difficulty to Gaius 'quia videbatur aliquam admittere dubitationem, unius diei an etiam plurium dierum spatio id terminandum sit; quod eo pertinet, quia saepe in aliis civitatibus subreptas res in alias civitates vel in alias provincias destinat fur perferre'. Paulus gets over this by strictly limiting the time: 'quo destinaverat quis auferre' sic accipiendum est, 'quo destinaverat eo die manere cum eo furto' Dig. 47. 2. 4. Practically Justinian's definition of the offence was accepted in the time of Gaius.

As a rule, arrest (deprehensio) actual or attempted was necessary to constitute furtum manifestum; it was not enough merely to see the thief in the commission of the act or with the stolen goods in his possession, Dig. 47. 2. 7. 1 and 2.

§ 4. The penalty for furtum conceptum and oblatum was fixed by the Twelve Tables at three times the value of the property stolen, Gaius iii. 191: the object of the actio furti oblati was to recover the threefold penalty already paid, under the actio concepti, by the person to whom the property had been passed. The offence of furtum prohibitum, for which the praetor established a penalty of four times the value (Gaius iii. 192), was not recognized by the decemviral legislation, apparently, it has been suggested, because the house was according to the primitive view

ea mente tibi data fuerit, ut apud te potius quam apud eum qui dederit conciperetur : nam tibi, apud quem concepta sit, propria adversus eum qui optulit, quamvis fur non sit, con-
G. iii. 188. **stituta est actio, quae appellatur oblati. est etiam prohibiti furti actio adversus eum, qui furtum quaerere** testibus praesentibus **volentem prohibuerit.** praeterea poena constituitur edicto praetoris per actionem furti non exhibiti adversus eum, qui furtivam rem apud se quaesitam et inventam non exhibuit. sed hae actiones, id est concepti et oblati et furti prohibiti nec non furti non exhibiti, in desuetudinem abierunt. cum enim requisitio rei furtivae hodie secundum veterem observationem non fit : merito ex consequentia etiam praefatae actiones ab usu communi recesserunt, cum manifestissimum est, quod omnes, qui scientes rem furtivam susceperint et
G. iii. 189. 5 celaverint, furti nec manifesti obnoxii sunt. **Poena manifesti furti quadrupli** est **tam ex servi persona quam ex liberi, nec**
G. iii. 190. **manifesti dupli.**

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not only an asylum, but under the special protection of the household gods—Vesta and the Penates—who dwelt and were worshipped there. But the Twelve Tables provided that if, after search was resisted, actual search was made with peculiar formalities, and the stolen property was discovered, the furtum should be treated as manifestum, Gaius iii. 192–4. This was called furtum lance et licio conceptum, and must have become obsolete when the praetor had imposed the same penalty for mere resistance to search. When Justinian says that search for stolen property was in his day no longer conducted secundum veterem observationem, he means in the presence of witnesses (τουτέστι μαρτύρων παρόντων Theoph.); it was undertaken by public officers, Dig. 11. 4. 3, a practice which seems to have been in use in the time of Plautus: 'ad praetorem ibo, ut conquisitores mihi det' Mercat. 3. 4. 78. Furtum conceptum and oblatum had been coordinated with manifestum and nec manifestum by Servius Sulpicius and Sabinus as distinct species of theft; Gaius agreed with Labeo that they were 'species potius actionis furto cohaerentes quam genera furtorum' iii. 183. The offence of furtum non exhibitum is not mentioned except in this passage of the Institutes.

§ 5. The penalty fixed by the Twelve Tables for furtum manifestum had been capitalis, Gaius iii. 189; if the fur was a free man, he was flogged, and then addictus to the person he had wronged; if a slave, he was flogged and hurled from the Tarpeian rock; and a thief who resisted arrest, or who stole by night, might be killed. The 'asperitas' of this punishment led to the praetor's substituting the pecuniary penalty mentioned in the text in all cases, Gaius ib.; that for furtum nec manifestum was fixed from the outset by the Twelve Tables. The reason why

6 Furtum autem fit non solum, cum quis intercipiendi causa rem alienam amovet, sed generaliter cum quis alienam rem invito domino contrectat. itaque sive creditor pignore sive is apud quem res deposita est ea re utatur sive is qui rem utendam accepit in alium usum eam transferat, quam cuius gratia ei data est, furtum committit. veluti si quis argentum utendum acceperit quasi amicos ad cenam invitaturus et id peregre secum tulerit, aut si quis equum gestandi causa commodatum sibi longius aliquo duxerit, quod veteres scripserunt de eo, qui in aciem equum perduxisset. 7 Placuit tamen eos, qui rebus commodatis aliter uterentur, quam utendas acceperint, ita furtum committere, si se intellegant id invito domino facere eumque si intellexisset non permissurum, ac si permissurum credant, extra crimen videri: optima sane distinctione, quia furtum sine affectu furandi non committitur. 8 Sed et si credat aliquis invito domino se rem commodatam sibi contrectare, domino autem volente id fiat, dicitur furtum

G. iii. 195. G. iii. 196. G. iii. 197. G. iii. 198.

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the two offences were so differently treated was 'because the legislator wished, by the amplitude of the legal remedy offered, to induce the aggrieved party not to take the law into his own hands and inflict summary vengeance on the offender' Mr. Poste on Gaius iii. 179; cf. Excursus X inf.

§ 6. Intercipere means the appropriation of ownership, quod alienum est, sibi habere: the illustrations given here fall under (6) p. 514 supr. For a creditor to sell the pignus against the terms of his contract was no less theft than using it, Dig. 47. 2. 74. The person 'qui rem utendam accepit' is the borrower in commodatum.

§ 7. In the corresponding passage of Gaius (iii. 197) for 'sine affectu furandi' we read 'sine dolo malo'. Sabinus (Gell. 11. 18), and perhaps also Labeo, had held that a borrower should be held guilty of theft in this case, if the dominus would not as a fact have consented to his using the res commodata in the particular way, 'cum id se invito domino facere iudicare deberet.' But without good reason for believing that his permission would not have been given there could be no dolus.

§ 8. After stating this case Gaius (iii. 198) says 'responsum, neutro teneri: furto, ideo quod non invito me rem contrectavit: servi corrupti, ideo quod deterior servus factus non est': and this statement of the law seems never to have been questioned by the jurists. Justinian's own enactment is in Cod. 6. 2. 20. For the actio servi corrupti see Tit. 6. 23 inf., and for concurrence of actions on the same set of circumstances see Tit. 9. 1 inf.

§ 9. As free persons who could be stolen, besides children in power, Gaius speaks of wives in manu, iudicati (insolvent debtors who had been

non fieri. unde illud quaesitum est, cum Titius servum Maevii sollicitaverit, ut quasdam res domino subriperet et ad eum perferret, et servus id ad Maevium pertulerit, Maevius, dum vult Titium in ipso delicto deprehendere, permisit servo quasdam res ad eum perferre, utrum furti an servi corrupti iudicio teneatur Titius, an neutro? et cum nobis super hac dubitatione suggestum est et antiquorum prudentium super hoc altercationes perspeximus, quibusdam neque furti neque servi corrupti actionem praestantibus, quibusdam furti tantummodo: nos huiusmodi calliditati obviam euntes per nostram decisionem sanximus non solum furti actionem, sed etiam servi corrupti contra eum dari: licet enim is servus deterior a sollicitatore minime factus est et ideo non concurrant regulae, quae servi corrupti actionem introducerent, tamen consilium corruptoris ad perniciem probitatis servi introductum est, ut sit ei poenalis actio imposita, tamquam re ipsa fuisset servus corruptus, ne ex huiusmodi impunitate et in alium servum, qui possit corrumpi, tale facinus a quibusdam

G. iii. 199. 9 perpetretur. **Interdum etiam liberorum hominum furtum fit, veluti si quis liberorum nostrorum, qui in potestate nostra sit,**

G. iii. 200. 10 **subreptus fuerit. Aliquando** autem **etiam suae rei quisque furtum committit, veluti si debitor rem quam creditori pignoris** causa **dedit subtraxerit.**

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addicti) and hired gladiators (auctorati): the offence could be proceeded against criminally under the lex Fabia, Tit. 18. 10 inf. Children in power, if stolen, were recovered by vindicatio, Dig. 6. 1. 1. 2, damages in which were estimated by the pecuniary loss which the pater had suffered, τὸ διαφέρον Theoph.: cf. Tit. 5. 1 inf. 'ob hominem liberum . . . . quantum ob eam rem aequum iudici videtur'.

§ **10.** Theft of a res sua was so uncommon a case that in defining furtum the jurists often forget to take it into consideration: § 6 supr., rem alienam: cf. Sabinus' definition in Gell. 11. 18 and Paul. Sent. Rec. 2. 31. 1 cited on (1) p. 514 supr. Paulus even goes so far as to say 'rei nostrae furtum facere non possumus' ib. 21. An owner committed theft by taking his property away from a person who had mere detention of it only if the latter had a legal right to detain it, Dig. 47. 2. 15. 2, e. g. a usufructuary, Dig. ib. 1: ib. 20. 1, and a bona fide possessor, Gaius iii. 200; cf. note on p. 228 supr. It was equally furtum for a pledgor to alienate the pignus without the pledgee's consent, Dig. 47. 2. 19. 6: so too with property merely hypothecated, ib. 66. The res sua which was stolen by a dominus never became furtiva so as to impede usucapion, Dig. ib. 20. 1.

Interdum furti tenetur, qui ipse furtum non fecerit: qualis 11 G. iii. 202.
est, cuius ope et consilio furtum factum est. in quo numero est, qui tibi nummos excussit, ut alius eos raperet, aut obstitit tibi, ut alius rem tuam exciperet, **vel oves aut boves tuas fugaverit, ut alius eas exciperet: et hoc veteres scripserunt de eo, qui panno rubro fugavit armentum. sed si quid** eorum **per lasciviam et non data opera, ut furtum admitteretur, factum est,** in factum **actio dari debeat.** at ubi ope Maevii Titius furtum fecerit, ambo furti tenentur. ope consilio eius quoque furtum admitti videtur, qui scalas forte fenestris supponit aut ipsas fenestras vel ostium effringit, ut alius furtum faceret, quive ferramenta ad effringendum aut scalas ut fenestris supponerentur commodaverit, sciens cuius gratia commodaverit. certe qui nullam operam ad furtum faciendum adhibuit, sed tantum consilium dedit atque hortatus est ad
furtum faciendum, non tenetur furti. Hi, qui in parentium 12
vel dominorum potestate sunt, si rem eis subripiant, furtum quidem illis faciunt et res in furtivam causam cadit nec ob id ab ullo usucapi potest, antequam in domini potestatem revertatur, sed furti actio non nascitur, quia nec ex alia ulla causa potest inter eos actio nasci: si vero ope consilio alterius furtum factum fuerit, quia utique furtum committitur, convenienter ille furti tenetur, quia verum est ope consilio eius furtum factum esse.

Furti autem actio ei competit, cuius interest rem salvam 13 G. iii. 203.
esse, licet dominus non sit: itaque nec domino aliter competit,

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§ **11.** 'Consilium dare videtur, qui persuadet et impellit atque instruit consilio ad furtum faciendum: opem fert, qui ministerium atque adiutorium ad subripiendas res praebet' Dig. 47. 2. 50. 3; cf. Dig. 50. 16. 53. 2. Instead of the actio in factum, which lay in the case of lascivia, there would be an actio utilis under the lex Aquilia if the alarm of the cattle at the red rag led to any of them being actually injured, Gaius iii. 202, Tit. 4. 16 inf., Dig. 47. 2. 50. 4; ib. 51; 9. 2. 27. 21. Though the poena could be recovered from accessories no less than from principals, they could not be sued by condictio furtiva, for which see on § 19 inf., Dig. 13. 1. 6.

§ **12.** Cf. Bk. ii. 6. 8 supr. The master could not sue the slave, nor the father the son, even after he had left his power, Tit. 8. 6 inf.: but the offender could be punished at once by invoking the aid of the praetor if the theft was serious, Dig. 48. 19. 11. 1.

§ **13.** The object of the actio furti was the recovery of the poena dupli or quadrupli fixed by law: though possibly one may infer from the words

G. iii. 204. 14 **quam si eius intersit rem non perire. Unde constat creditorem
de pignore subrepto furti agere posse,** etiamsi idoneum de-
bitorem habeat, quia expedit ei pignori potius incumbere quam
in personam agere: **adeo quidem ut, quamvis ipse debitor
eam rem subripuerit, nihilo minus creditori competit actio**
G. iii. 205. 15 **furti. Item si fullo polienda curandave aut sarcinator sar-
cienda vestimenta mercede certa acceperit eaque furto amiserit,
ipse furti habet actionem, non dominus, quia domini nihil
interest eam rem non perire, cum iudicio locati a fullone aut
sarcinatore rem suam persequi potest.** sed et bonae fidei
emptori subrepta re quam emerit, quamvis dominus non sit,
omnimodo competit furti actio, quemadmodum et creditori.

'damnum pro fure decidere' which occurred in its formula that in the earlier time it was regarded as compensating for loss as well as gratifying the desire for vengeance. The rule as to who could bring it is similarly laid down by Gaius iii. 203, and Paulus; 'furti actione is agere potest, cuius interest rem non periisse' Sent. Rec. 2. 31. 4. All of these statements, however, are somewhat too wide: 'neque . . . . cuiuscunque intererit, rem non perire, habet furti actionem' Dig. 47. 2. 14. 10: the action lay at the suit only of the owner, bona fide possessor, or person who had detention of or some right in rem (e. g. usufruct, hypotheca) in the stolen property less than ownership, and then only if he was legitimately (Dig. 47. 2. 77. 1) prejudiced by the theft. Hence the vendee before delivery was debarred from suing in his own name, Dig. 47. 2. 14 pr.: ib. 80 pr., as also was the depositary under ordinary circumstances, § 17 inf., and all others who had merely rights in personam in respect of the property stolen, e. g. the promisee in a stipulation, Dig. 47. 2. 86. The action lay against the thief, even after capitis deminutio, but not against his heirs, and cumulatively against all who were guilty of the delict.

§ 14. It seems at one time to have been doubtful whether the pledgee ought to be allowed to bring actio furti if the pledgor was solvent (idoneus); 'sed utrum semper creditoris interest, an ita demum, si debitor solvendo non est? et putat Pomponius semper eius interesse pignus habere, quod et Papinianus . . . probat' Dig. 47. 2. 12. 2. Papinian even thought that if two things were pledged for one debt, and one of them was stolen, the pledgee ought to be allowed actio furti even if the other alone was adequate security, Dig. ib. 14. 5.

§ 15. The clothes are at the risk of the fullo or sarcinator, Dig. 47. 2. 14. 16. The words idem est et si . . . sarcinator apparently refer to solvency, not insolvency; see the end of § 16. A mala fide possessor had no actio furti, though the property was at his risk, Dig. 47. 2. 14. 4. The interest of the bona fide possessor, in virtue of which he could sue, was his right to the fruits and the interruption of usucapio, not his liability to the real dominus, which accrued only after the latter had joined issue with him in an action to establish his ownership, Dig. 5. 3. 25. 7.

fulloni vero et sarcinatori non aliter furti competere placuit, quam si solvendo sint, hoc est si domino rei aestimationem solvere possint: **nam si solvendo non sunt, tunc quia ab** eis **suum dominus consequi non possit, ipsi** domino **furti actio competit, quia hoc casu ipsius interest rem salvam esse.** idem est et si in parte solvendo sint fullo aut sarcinator. **Quae de fullone et sarcinatore diximus, eadem et ad eum** 16 G. iii. 206.
cui commodata res est transferenda veteres existimabant: **nam ut** ille fullo **mercedem accipiendo custodiam praestat, ita is quoque, qui commodum utendi percipit, similiter necesse habet custodiam praestare.** sed nostra providentia etiam hoc in decisionibus nostris emendavit, ut in domini sit voluntate, sive commodati actionem adversus eum qui rem commodatam accepit movere desiderat, sive furti adversus eum qui rem subripuit, et alterutra earum electa dominum non posse ex paenitentia ad alteram venire actionem. sed si quidem furem elegerit, illum qui rem utendam accepit penitus liberari. sin autem commodator veniat adversus eum qui rem utendam accepit, ipsi quidem nullo modo competere posse adversus furem furti actionem, eum autem, qui pro re commodata convenitur, posse adversus furem furti habere actionem, ita tamen, si dominus sciens rem esse subreptam adversus eum cui res commodata fuit pervenit: sin autem nescius et dubitans rem non esse apud eum commodati actionem instituit, postea autem re comperta voluit remittere quidem commodati actionem, ad furti autem pervenire, tunc licentia ei concedatur et adversus furem venire nullo obstaculo ei opponendo, quoniam incertus constitutus movit adversus eum qui rem utendam accepit commodati actionem (nisi domino ab eo satisfactum est: tunc etenim omnimodo furem a domino quidem furti actione liberari, suppositum autem esse ei, qui pro re sibi commodata domino satisfecit), cum manifestissimum est, etiam si ab initio dominus actionem instituit commodati ignarus rem esse subreptam, postea autem hoc ei

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§ 16. The only jurists who to our knowledge discussed this question (Gaius iii. 206, Q. Mucius, Dig. 13. 6. 5. 3, Celsus, Julianus, and Papinian, Dig. 47. 2. 14; ib. 15. 2; ib. 48. 4, etc.) were for observing the same rules where a thing was commodata as where it was locata. Justinian's enactment is in Cod. 6. 2. 22.

cognito adversus furem transivit, omnimodo liberari eum
qui rem commodatam accepit, quemcumque causae exitum
dominus adversus furem habuerit: eadem definitione opti-
nente, sive in partem sive in solidum solvendo sit is qui rem
G. iii. 207. 17 commodatam accepit. **Sed is, apud quem res deposita est,
custodiam non praestat,** sed **tantum in eo obnoxius est, si
quid ipse dolo malo fecerit: qua de causa si res ei subrepta
fuerit, quia restituendae eius nomine depositi non tenetur nec
ob id eius interest rem salvam esse, furti agere non potest,
G. iii. 208. 18 sed furti actio domino competit. In summa sciendum est
quaesitum esse, an impubes rem alienam amovendo furtum
faciat.** et **placet, quia furtum ex affectu consistit, ita demum
obligari eo crimine impuberem, si proximus pubertati sit et
19 ob id intellegat se delinquere.** Furti actio sive dupli sive
quadrupli tantum ad poenae persecutionem pertinet: nam
ipsius rei persecutionem extrinsecus habet dominus, quam aut
vindicando aut condicendo potest auferre. sed vindicatio
quidem adversus possessorem est, sive fur ipse possidet sive
alius quilibet: condictio autem adversus ipsum furem here-
demve eius, licet non possideat, competit.

§ 17. If a depositary fraudulently enabled a depositum to be stolen, he was liable to actio depositi, and could not sue the thief himself, 'non enim debet ex dolo suo furti quaerere actionem' Dig. 47. 2. 14. 3 and 4. He was also liable if he had undertaken the custodia, note on Bk. iii. 14. 3 supr., and then apparently could bring the penal action, Dig. 47. 2. 14. 16; 47. 8. 2. 23 and 24.

§ 18. For proximus pubertati see on Bk. iii. 19. 10 supr.

§ 19. The option allowed to the owner of stolen property between a real and a personal action is noted as an anomaly in Tit. 6. 14 inf. after Gaius iv. 4. Furtum in no case transferred ownership, so that, as the owner of the goods stolen remained their owner, the only action logically open to him was a vindicatio. If the goods had been destroyed, or if, being money, it had been spent or mixed with money belonging to the thief, his ownership would have been extinguished, and (though only in this and some analogous cases, Bk. ii. 1. 26 and note supr.) a condictio would have lain; but if he could not prove this, e. g. if the property had been lost or concealed, he was, strictly speaking, debarred from a personal action, which, however, he was allowed to institute in every case, if he preferred it to vindicatio, in order to relieve him from the necessity of ascertaining the facts. If then the owner knew who possessed the stolen property, his natural remedy was vindicatio against him; but if he did not know where it was, he could bring condictio furtiva against the thief or his heir for the recovery either of it with fruits, accessions, etc., or of

II

VI BONORUM RAPTORUM

Qui res alienas rapit, tenetur quidem etiam furti (quis enim magis alienam rem invito domino contrectat, quam qui vi rapit? ideoque recte dictum est eum improbum furem esse): sed tamen propriam actionem eius delicti nomine praetor introduxit, quae appellatur vi bonorum raptorum et est intra annum quadrupli, post annum simpli. quae G. iii. 209.

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its value with interest, Dig. 13. 1. 3; ib. 8. 2. It might be more to his interest even to bring an actio ad exhibendum (Tit. 6. 31 inf.), which would lie against any one who had the property in his possession, or had fraudulently parted with it: if it were not produced the defendant would have to pay the plaintiff's 'interest' and this might be more than the value recoverable by condictio: see Dig. 12. 1. 11. That the condictio furtiva is not delictal, and that the obligation which it enforces does not arise ex delicto, is clear from this very fact, that the heir is liable in solidum, not merely 'pro eo quo divitior factus est'.

The treatment of furtum as a civil wrong is quite in keeping with the history of Roman law, in which the notion of crime was of exceedingly slow development; see Hunter's Roman Law p. 904, Maine's Ancient Law chap. x. Under the empire, however, the general rule was that any one who could bring a penal action on a delict (other than damnum) might, if he preferred it, prosecute the delinquent before a criminal tribunal, Dig. 47. 1. 3, forfeiting, however, thereby his right to recover the poena, Dig. 47. 2. 56. 1. Theft indeed was in the time of the classical jurists most usually made the subject of criminal proceedings, though not under any of the regular iudicia publica (Tit. 18 inf.): 'meminisse oportebit nunc furti plerumque criminaliter agi, et eum qui agit in crimen subscribere, non quasi publicum sit iudicium, sed quia visum est temeritatem agentium etiam extraordinaria animadversione coercendam' Ulpian in Dig. 47. 2. 92. For the nature of the punishment, which might be death, penal servitude, flogging, or relegatio, according to the character of the offence, see Hunter's Roman Law p. 911.

Tit. II. Robbery was not originally distinguished from theft; the robber was liable to the penalties of furtum manifestum or nec manifestum according to the circumstances under which he was detected, Dig. 47. 8. 1; ib. 2. 26. Cicero tells us (pro Tullio 8) that it was constituted an independent delict by Lucullus when praetor in B. C. 77, by reason of the frequency of crimes of violence which ensued upon the Social war. The terms of the edict are preserved: 'si cui dolo malo hominibus coactis damni quid factum esse dicetur, sive cuius bona rapta esse dicentur, . . . iudicium dabo' Dig. 47. 8. 2 pr. It thus introduced a new penalty for two classes of cases, those of damage to property, and those of robbery, 'hominibus coactis', words which apply to both offences, Dig. ib. 2. 3

actio utilis est, etiamsi quis unam rem licet minimam rapuerit. quadruplum autem non totum poena est et extra poenam rei persecutio, sicut in actione furti manifesti diximus: sed in quadruplo inest et rei persecutio, ut poena tripli sit, sive comprehendatur raptor in ipso delicto sive non. ridiculum est enim levioris esse condicionis eum qui vi rapit,

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and 12. The original edict seems to have run ' hominibus *armatis* coactisque '; but the carrying of arms for the purposes of crime became so rare under the Empire that the word was omitted and the definition of the offence thereby extended. Before long too the words ' hominibus coactis ' were taken pro non scriptis: ' hoc enim quod ait, hominibus coactis, sic accipere debemus, *etiam* hominibus coactis: ut sive solus vim fecerit, sive etiam hominibus coactis, vel armatis, vel inermibus, hoc edicto teneatur ' (Dig. 47. 8. 2. 7 with Heise's emendation). Lastly, the bearing of the edict of Lucullus on wilful damage to property was lost from sight, its practical importance being in the Corpus iuris confined to rapina, which indeed seems to have been the case as early as the time of Ulpian: ' haec actio vulgo tibi (vi ?) bonorum raptorum dicitur ' Dig. 47. 8. 2. 17.

The fact that every case of robbery was also a furtum makes it improbable that the actio bonorum vi raptorum was ever employed except within an annus utilis from the commission of the offence, and that only when the offence itself did not come within the definition of furtum manifestum. The penalty for which it lay being less than that recoverable by actio furti manifesti (viz. three times the value of the property), it is clear that if the raptor was detected ' antequam eo pervenerit quo perferre ac deponere rem destinasset ' (Tit. 1. 3 supr.), the plaintiff would prefer the latter remedy, which had the further advantage of not being barred by the lapse of such a year from the commission of the offence (see references inf.); and after the lapse of the year the plaintiff could still bring an actio furti, which, even if the offence were nec manifestum, would enable him to recover a substantial penalty, while by the actio bonorum vi raptorum he could get no penalty at all.

In Gaius' time some had thought that the quadruplum recoverable by the actio bonorum vi raptorum was all penalty, and that a vindicatio or condictio lay in addition, as in the case of furtum, Gaius iv. 8. The uncertainty was due to the omission of the edict to say anything precise about the matter; and as the actiones furti and damni iniuria (which were relied on as precedents) were one of them purely penal and the other mixed (Gaius iv. 9, Tit. 6. 19 inf.) it was natural that opinions should differ. Cf. Tit. 6. 19 inf.

The annus within which the actio bonorum vi raptorum was genuinely penal was utilis, Dig. 47. 8. 2. 13; for the explanation of the term see on Bk. iii. 9. 9 supr. All praetorian penal actions had the same short limitation except that furti manifesti, which was perpetua because the penalty thereby recoverable was substituted for capital punishment,

quam qui clam amovet. Quia tamen ita competit haec actio, 1
si dolo malo quisque rapuerit: qui aliquo errore inductus suam rem esse et imprudens iuris eo animo rapuit, quasi domino liceat rem suam etiam per vim auferre possessoribus, absolvi debet. cui scilicet conveniens est nec furti teneri eum, qui eodem hoc animo rapuit. sed ne, dum talia excogitentur, inveniatur via, per quam raptores impune suam exerceant avaritiam: melius divalibus constitutionibus pro hac parte prospectum est, ut nemini liceat vi rapere rem mobilem vel se moventem, licet suam eandem rem existimet: sed si quis contra statuta fecerit, rei quidem suae dominio cadere, sin autem aliena sit, post restitutionem etiam aestimationem eiusdem rei praestare. quod non solum in mobilibus rebus, quae rapi possunt, constitutiones optinere censuerunt, sed etiam in invasionibus, quae circa res soli fiunt, ut ex hac causa omni rapina homines abstineant. In hac actione non 2
utique exspectatur rem in bonis actoris esse: nam sive in bonis sit sive non sit, si tamen ex bonis sit, locum haec actio habebit. quare sive commodata sive locata sive etiam

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Gaius iv. 110, 111, Tit. 12 pr. inf. The heir of the robber was not liable to actio bonorum vi raptorum in any case, though he was suable by condictio to the extent to which the inheritance had been enriched by the proceeds of the wrong: 'adversus heredes autem vel caeteros successores non dabitur, quia poenalis actio in eos non datur. An tamen in id, quod locupletiores facti sunt, dari debeat, videamus. et ego puto ideo praetorem non esse pollicitum in heredes in id quod ad eos pervenit, quia putavit sufficere condictionem' Ulpian in Dig. 47. 8. 2. 27.

§ 1. The constitutions referred to are those of Valentinian, Theodosius, and Arcadius (A. D. 389), in Cod. 8. 4. 7 'si quis in tantam furoris pervenerit audaciam, ut possessionem rerum apud fiscum vel apud homines quoslibet constitutarum ante adventum iudicialis arbitrii violenter invaserit, dominus quidem constitutus possessionem quam abstulit restituat possessori et dominium eiusdem rei amittat. Si vero alienarum rerum possessionem invasit, non solum eam possidentibus reddat, verum etiam aestimationem earundem rerum restituere compellatur'. For the relation of this enactment to the interdict unde vi see on Tit. 15. 6 inf. and Mr. Poste's note on Gaius iii. 209.

§ 2. The expression ex bonis is here opposed to dominium, to denote the bonitarian form of which the phrase 'in bonis habere' was employed; this seems clear from the language towards the end of the paragraph, 'ut non dominium accipiat, sed illud solum, quod ex bonis eius . . . .' In other passages in bonis and ex bonis are not distinguished, e. g. Dig. 50. 16. 49; 41. 1. 42; 35. 2. 32. 1, where in bonis has such a wide sense that

pignerata sive deposita sit apud Titium sic, ut intersit eius eam non auferri, veluti si in re deposita culpam quoque promisit, sive bona fide possideat, sive usum fructum in ea quis habeat vel quod aliud ius, ut intersit eius non rapi: dicendum est competere ei hanc actionem, ut non dominium accipiat, sed illud solum, quod ex bonis eius qui rapinam passus est, id est quod ex substantia eius ablatum esse proponatur. et generaliter dicendum est, ex quibus causis furti actio competit in re clam facta, ex isdem causis omnes habere hanc actionem.

III

DE LEGE AQUILIA

G. iii. 210. **Damni iniuriae actio constituitur per legem Aquiliam. cuius primo capite cautum est, ut si quis hominem alienum**

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nothing seems to be left for ex bonis to include. The distinction between the persons who could sue on theft, and those who could sue on robbery, seems to consist in the depositary being in some cases allowed the latter where he could not bring the former action, or perhaps in some persons having the actio bonorum vi raptorum who, though having an interest, have no real right, possession, or detention; 'utilius dicendum est, etsi cesset actio furti ob rem depositam, esse tamen vi bonorum raptorum actionem, quia non minima differentia est inter eum, qui clam facit, et eum, qui rapit, cum ille celet suum delictum, hic publicet et crimen etiam publicum admittat. Si quis igitur interesse sua vel modice docebit, debet habere vi bonorum raptorum actionem' Dig. 47. 8. 2. 24.

The criminal alternative for the civil action on robbery was an indictment under the lex Iulia de vi, for the penalties inflicted by which see Tit. 18. 8 inf.

Tit. III. 'Lex Aquilia omnibus legibus, quae ante se de damno iniuria locutae sunt, derogavit (repealed), sive duodecim tabulis sive alia quae fuit, quas leges nunc referre non est necesse. Quae lex Aquilia plebiscitum est, cum eam Aquilius, tribunus plebis, a plebe rogaverit' Dig. 9. 2. 1 pr. and 1, cf. § 15 inf. Its date is usually given as B. C. 287 or 286 (see Grueber, lex Aquilia, pp. 183–185); but Girard thinks, for reasons given in his Manual, 4th ed. p. 411, note 1, that it can only be placed vaguely between the Twelve Tables and the end of the seventh century. The terms of cap. i. are preserved by Gaius in the Digest, loc. cit. 2 pr. 'qui servum servamve alienum alienamve, quadrupedem vel pecudem iniuria occiderit, quanti id in eo anno plurimi fuit, tantum aes dare domino damnas esto'. For the mode of reckoning the year cf. Dig. ib. 21. 1 'annus retrorsus computatur, ex quo quis occisus est: quod si mortifere fuerit vulneratus, et postea post longum intervallum mortuus sit, inde annus numerabitur secundum Iulianum, ex quo vulneratus est, licet Celsus contra scribit'.

alienamve quadrupedem quae pecudum numero sit iniuria occiderit, quanti ea res in eo anno plurimi fuit, tantum domino dare damnetur. Quod autem non praecise de quadrupede, 1
sed de ea tantum quae pecudum numero est cavetur, eo pertinet, ut neque de feris bestiis neque de canibus cautum esse intellegamus, sed de his tantum, quae proprie pasci dicuntur, quales sunt equi muli asini boves oves caprae. de suibus quoque idem placuit: nam et sues pecorum appellatione continentur, quia et hi gregatim pascuntur: sic denique et Homerus in Odyssea ait, sicut Aelius Marcianus in suis institutionibus refert:

δήεις τόν γε σύεσσι παρήμενον· αἱ δὲ νέμονται
πὰρ Κόρακος πέτρῃ, ἐπί τε κρήνῃ Ἀρεθούσῃ.

Iniuria autem occidere intellegitur, qui nullo iure occidit. 2 G.iii.211.
itaque qui latronem occidit, non tenetur, utique si aliter

It is only to the owner ('ero, hoc est, domino' Dig. ib. 11. 6) that the action was granted by the letter of both the first and third chapters of the statute, but in its spirit an actio utilis or in factum (§ 16 inf.) was permitted to the bona fide possessor (Dig. ib. 11. 8, ib. 17), the usufructuary and usuary (ib. 11. 10), and the pledgee (ib. 17), though to the latter only if he had been actually prejudiced by the damnum, as, e. g. if the debtor was insolvent, or if he had lost his personal remedy, and only upon the condition that whatever he recovered should be deducted from the debt secured by the pledge. The only case in which a person having merely rights in personam in respect to the property injured could bring the actio utilis or in factum was that of the colonus or tenant farmer, Dig. 9. 2. 27. 14. All these persons could bring their action against even the dominus if it was he who had done the damnum (Dig. ib. 12; ib. 17); so that the word alienum in the statute must not be pressed.

§ **1.** Praecise, id est, breviter, sine additamento (Schrader): cf. 'non praecise, sed sub condicione' Dig. 36. 3. 1. 20. The quotation is from Od. xiii. 407–8.

§ **2.** That the damnum is 'iniuria datum' implies two things: (1) that the person charged has no right to do the act; 'nemo damnum facit, nisi qui id fecit quod facere ius non habet' Dig. 50. 17. 151. Instances in which this condition is not satisfied are Dig. 9. 2. 29. 7: ib. 6. 13 and 14 (where the damage results from lawful exercise of magisterial authority): ib. 29. 3 (where it is done in averting damnum from oneself); ib. 5. 3 (right to inflict moderate chastisement); ib. 4; ib. 5 pr.; ib. 45. 4 (self-defence: cf. the text of this section): Grueber, lex Aquilia, pp. 214–222. (2) The act by which the damage is occasioned must be one for which the person charged is responsible; it must be due at least to culpa on his part: for this see the next section.

3 periculum effugere non potest. Ac ne is quidem hac lege tenetur, qui casu occidit, si modo culpa eius nulla invenitur: nam alioquin non minus ex dolo quam ex culpa quisque hac
4 lege tenetur. Itaque si quis, dum iaculis ludit vel exercitatur, transeuntem servum tuum traiecerit, distinguitur. nam si id a milite quidem in campo eoque, ubi solitum est exercitari, admissum est, nulla culpa eius intellegitur: si alius tale quid admisit, culpae reus est. idem iuris est de milite, si is in alio loco, quam qui exercitandis militibus destinatus est, id
5 admisit. Item si putator ex arbore deiecto ramo servum tuum transeuntem occiderit, si prope viam publicam aut vicinalem id factum est neque praeclamavit, ut casus evitari possit, culpae reus est: si praeclamavit neque ille curavit cavere, extra culpam est putator. aeque extra culpam esse intellegitur, si seorsum a via forte vel in medio fundo caedebat,

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§ 3. The fact that dolus was not essential to constitute damnum iniuria datum distinguishes it clearly from the three other delicts: 'when culpa is once established, the amount of the defendant's liability does not depend on its degree'; 'in lege Aquilia et levissima culpa venit' Dig. 9. 2. 44 pr., 'culpam autem esse, quod, cum a diligente provideri potuerit, non esse provisum' ib. 31: cf. § 8 inf. The idea is sufficiently illustrated in the next five sections.

It is a much argued question whether very slight negligence in a party to a legal relation in which he was answerable for culpa lata only would entitle the other party to sue him under the lex Aquilia; as where a depositary by slight negligence causes destruction of or damage to the res deposita. The true answer depends on the correct appreciation of a rather fine distinction. Some acts are acquitted of culpa, if there be a legal relation between the parties, which would otherwise be imputable; e. g. a delicate piece of glass work is given to an artificer to repair, and breaks to pieces in his hands through no want of skill or caution on his part. But if the act is one which is not excused by virtue of the legal relation, the actio legis Aquiliae will lie, because the delinquent is exempted from liability for culpa levis only in respect of the specific duties which that relation imposes on him, Dig. 40. 12. 13 pr.; 47. 4. 1. 2; 9. 2. 5. 3: see Grueber, pp. 230–233.

§ 4. Where a man is killed by a javelin thrown by a soldier 'in campo eoque ubi solitum est exercitari' the culpa is all his own, and 'quod quis ex culpa sua damnum sentit non intellegitur damnum sentire' Dig. 50. 17. 203. Contributory negligence of the person injured usually excluded the action, Dig. 9. 2. 11 pr.; ib. 28. 1; ib. 52. 1: but this was not so if the damage was wilful, even though there had been culpa lata on the other side, Dig. ib. 9. 4.

licet non praeclamavit, quia eo loco nulli extraneo ius fuerat
versandi. Praeterea si medicus, qui servum tuum secuit, 6
dereliquerit curationem atque ob id mortuus fuerit servus,
culpae reus est. Imperitia quoque culpae adnumeratur, veluti 7
si medicus ideo servum tuum occiderit, quod eum male secuerit
aut perperam ei medicamentum dederit. Impetu quoque mu- 8
larum, quas mulio propter imperitiam retinere non potuerit,
si servus tuus oppressus fuerit, culpae reus est mulio. sed et
si propter infirmitatem retinere eas non potuerit, cum alius
firmior retinere potuisset, aeque culpae tenetur. eadem pla-
cuerunt de eo quoque, qui, cum equo veheretur, impetum eius
aut propter infirmitatem aut propter imperitiam suam retinere
non potuerit. His autem verbis legis '**quanti id in eo anno** 9 G.iii.214.
plurimi fuerit' illa sententia exprimitur, ut si quis hominem
tuum, qui hodie **claudus aut luscus** aut mancus erit, **occiderit,**
qui in eo anno integer aut pretiosus **fuerit,** non tanti teneatur,
quanti is hodie erit, **sed quanti in eo anno plurimi fuerit.** qua
ratione creditum est poenalem esse huius legis actionem, quia

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§ **6.** As a general rule the penalty of the lex Aquilia was incurred only by positive acts of commission: 'sunt casus, quibus cessat Aquiliae actio . . . . nam qui agrum non proscindit, qui vites non subserit, item aquarum ductus corrumpi patitur, lege Aquilia non tenetur' Dig. 7. 1. 13. 2. But where a person had once commenced a course of action, cessation of which would be disastrous (e. g. the case in the text), an omission entailed liability, Dig. 9. 2. 8 pr.; ib. 27. 9; ib. 31: Grueber, pp. 208–214.

§ **7.** Imperitia in surgeons is treated as culpa also in Dig. 9. 2. 7. 8; in artificers, ib. 27. 29; and assessors, Dig. 2. 2. 2: cf. the next section.

§ **8.** 'Nec videtur iniquum, si infirmitas culpae adnumeretur, cum affectare quis non debeat, in quo vel intellexit vel intellegere debet, infirmitatem suam alii periculosam futuram' Dig. 9. 2. 8. 1.

§ **9.** The actio legis Aquiliae was penal not only for the reason noticed here, but also because the delinquent, unless the plaintiff failed to prove his case, was assumed to be condemned from the outset (damnas esto dare), so that if he were cast in the suit after denying his liability, he was condemned in duplum, Tit. 6. 19. 23, 26 inf., Gaius iii. 216; iv. 9. 171.

The action was maintainable against the delinquent's heir so far as the inheritance had been enriched by the delict: 'in heredem vel ceteros (successores) haec actio non dabitur, cum sit poenalis (see Tit. 12. 1 inf.), nisi forte ex damno locupletior heres factus sit' Dig. 9. 2. 23. 8. Justinian's qualification in the text (quae transitura . . . . aestimaretur) is irreconcileable with the statements of the older jurists, and tends only to confusion.

non solum tanti quisque obligatur, quantum damni dederit, sed aliquando longe pluris: ideoque constat in heredem eam actionem non transire, quae transitura fuisset, si ultra damnum numquam lis aestimaretur. Illud non ex verbis legis, sed ex interpretatione placuit non solum perempti corporis aestimationem habendam esse secundum ea quae diximus, sed eo amplius quidquid praeterea perempto eo corpore damni
G. iii. 212. vobis adlatum fuerit, **veluti si servum tuum heredem ab aliquo institutum ante quis occiderit, quam is iussu tuo adiret**: nam **hereditatis** quoque **amissae** rationem esse habendam constat. item **si ex pari mularum unam vel ex quadriga equorum**

'Aliquando longe pluris', i. e. not always: for the slave (e. g.) may have been at his full value when killed, and the defendant may in the abstract admit his liability, the object of the suit being solely to assess the damages: cf. Tit. 6. 19 inf. '. . . . sed interdum,' etc.

§ 10. When one person has to pay another the value of a thing or act, two standards may be taken; the market value, verum rei pretium; or its value to the particular person to whom the payment is to be made, in other words, his 'interesse'. When the latter standard is adopted, allowance is made not only for the market value, but also for what are called damnum indirectum or emergens (illustrated by the team of mules and company of actors in the text) and lucrum cessans (e. g. the slave who has been instituted heir, and is killed before he can benefit his master by accepting); the damages are assessed upon the principle of putting the plaintiff so far as possible in the position in which he would have been had the act been done which ought to have been done, or had the wrongful act never been committed. The expression 'quanti ea est res' or 'fuit' (in actiones arbitrariae 'erit') is used to denote both of these standards: 'haec verba, quanti eam rem paret esse, non ad quod interest, sed ad rei aestimationem referuntur' Dig. 50. 16. 193, 'quanti ea res est, cuius damni infecti nomine cautum non erit, iudicium datur, quod non ad quantitatem refertur, sed ad id, quod interest, et ad utilitatem venit, non ad poenam' Dig. 39. 2. 4. 7.

The plaintiff's interesse was the standard in actions both on delict (except the actio bonorum vi raptorum, Dig. 47. 8. 2. 13) and on breaches of contract involving dolus or imputable culpa. Justinian points out that by the text of the lex Aquilia only the verum rei pretium could be claimed; the change of standard was due to the 'interpretatio' of the lawyers: cf. Ulpian in Dig. 9. 2. 21. 2 'sed utrum corpus eius solum aestimamus, quantum fuerit, cum occideretur, an potius quanti interfuit nostra non esse occisum? et hoc iure utimur, ut eius quod interest fiat aestimatio'. But the plaintiff could not demand that account should be taken of lucrum which, though hoped for, was quite uncertain, Dig. ib. 29. 3, or of what the Germans call 'Affectionsinteresse', ib. 33 pr. There seems to be

unum occiderit, vel ex comoedis unus servus fuerit occisus : non solum occisi fit aestimatio, sed eo amplius id quoque computatur, quanto depretiati sunt qui supersunt. Liberum 11 G. iii. 213.
est autem ei, cuius servus fuerit occisus, et privato iudicio legis Aquiliae damnum persequi et capitalis criminis eum reum facere.

Caput secundum legis Aquiliae in usu non est. Capite 12, 13 G. iii. 217.
tertio de omni cetero damno cavetur. Itaque si quis servum vel eam quadrupedem quae pecudum numero est vulneraverit, sive eam quadrupedem quae pecudum numero non est, veluti canem aut feram bestiam, vulneraverit aut occiderit, hoc capite actio constituitur. in ceteris quoque omnibus animalibus, item in omnibus rebus quae anima carent damnum iniuria

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a general tendency in Roman law to favour, in the earlier periods, the assessment of damages according to the verum rei pretium, and in the later to substitute the alternative method : for illustrations of the effect of the change in connection with the lex Aquilia, see Grueber, pp. 266–271. By Cod. 7. 47. 1. 1 Justinian enacted that in actions on contract the damages recoverable as 'interesse' by the plaintiff should never be more than double the verum rei pretium.

§ 11. The criminal prosecution would be under the lex Cornelia de sicariis, B. C. 80, for which see Tit. 18. 5 inf., and was in addition to the civil remedy : 'ex morte ancillae . . . . tam legis Aquiliae actionem quam criminalem accusationem competere posse non ambigitur' Cod. 3. 35. 3, οὐδὲ γὰρ ἡ privata κινηθεῖσα ἀγωγὴ τὴν publicam σβέννυσιν Theoph. From Gaius iii. 213 it would seem that in his day it was otherwise : 'liberum arbitrium habet, vel capitali crimine . . . . vel hac lege damnum persequi' : but Ulpian speaks of the civil action as not barring the prosecution : 'in factum agendum, criminali poena servata' Dig. 19. 5. 14. 1.

§ 12. 'Capite secundo in adstipulatorem qui pecuniam in fraudem stipulatoris acceptam fecerit, quanti ea res esset, tanti actio constituitur' Gaius iii. 215. For the adstipulator see Gaius iii. 110–114. This chapter had gone into desuetude at least as early as Ulpian, Dig. 9. 2. 27. 4. Schrader suggests that the incorporation of a rule of contract law in an enactment relating to damage to property was due to the desire to subject the fraudulent adstipulator to the procedure by manus iniectio pura : see Gaius iv. 22, and the General Index.

§ 13. Cap. iii. ran 'ceterarum rerum, praeter hominem et pecudes occisos, si quis alteri damnum faxit, quod usserit, fregerit, ruperit iniuria, quanti ea res erit in diebus triginta proximis, tantum aes domino dare damnas esto' Dig. 9. 2. 27. 5. The interpretation of ruperit by corruperit ('rupisse verbum fere omnes veteres sic intellexerunt, corrupisse' Dig. ib. 27. 13) brought all damage caused by immediate physical contact with

datum hac parte vindicatur. si quid enim ustum aut ruptum aut fractum fuerit, actio ex hoc capite constituitur : quamquam poterit sola rupti appellatio in omnes istas causas sufficere : ruptum enim intellegitur, quoquo modo corruptum est. unde non solum usta aut fracta, sed etiam scissa et collisa et effusa et quoquo modo perempta atque deteriora facta hoc verbo continentur : denique responsum est, si quis in alienum vinum aut oleum id immiserit, quo naturalis bonitas vini vel olei cor-
14 rumperetur, ex hac parte legis eum teneri. Illud palam est, sicut ex primo capite ita demum quisque tenetur, si dolo aut culpa eius homo aut quadrupes occisus occisave fuerit, ita ex hoc capite ex dolo aut culpa de cetero damno quemque teneri.
G. iii. 218. **hoc tamen capite non quanti in eo anno, sed quanti in diebus triginta proximis res fuerit,** obligatur **is qui damnum dederit.**
15 **Ac ne plurimi quidem verbum adicitur. sed Sabino** recte **placuit perinde habendam** aestimationem, **ac si etiam hac parte plurimi verbum adiectum fuisset :** nam plebem Romanam, quae Aquilio tribuno rogante hanc legem tulit, **contentam fuisse, quod prima parte eo verbo usa est.**

G. iii. 219. 16 **Ceterum placuit ita demum ex hac lege actionem esse, si quis** praecipue **corpore suo damnum dederit. ideoque** in eum, qui **alio modo damnum** dederit, **utiles actiones dari** solent : **veluti si quis hominem alienum aut pecus ita incluserit, ut fame necaretur, aut iumentum tam vehementer egerit, ut**

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a res aliena (damnum corpore corpori datum, Dig. ib. 27. 13 sq., § 16 inf.) within the terms of the statute.

§ **16.** For actiones in factum in general see references to Excursus X inf. in the General Index, and for the specific one mentioned in this section cf. Dig. 19. 5. 11 'quia actionum non plenus numerus esset, ideo plerumque actiones in factum desiderantur. Sed et eas actiones, quae legibus proditae sunt, si lex iusta ac necessaria sit, supplet praetor in eo, quod legi deest ; quod facit in lege Aquilia reddendo actiones in factum accommodatas legi Aquiliae, idque utilitas eius legis exigit.' It is difficult to determine at all precisely the relation to one another of this actio in factum and the actio utilis legis Aquiliae also mentioned in the text. Justinian's own statement here suggests the hypothesis that the actio utilis was the proper remedy where the damage was done corpori, but not corpore, while where it was not even done corpori the injured person had only an actio in factum ; but this distinction is not even hinted at by Gaius iii. 219, and other passages in the Digest, some of which are cited below, are strongly against it. The only conclusion which seems to be

rumperetur, aut pecus in tantum exagitaverit, ut praecipitaretur, **aut si quis alieno servo persuaserit, ut in arborem ascenderet vel in puteum descenderet, et is ascendendo vel descendendo aut mortuus fuerit aut aliqua parte corporis laesus erit,** utilis in eum actio datur. **sed si quis alienum servum de ponte aut ripa in flumen deiecerit et is suffocatus fuerit, eo quod proiecerit corpore suo damnum dedisse non difficiliter intellegi poterit** ideoque ipsa lege Aquilia tenetur.

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warranted is that in all cases which had been brought within the scope of the statute by construction an actio in factum lay, but that the actio utilis had a less extensive application, or, as one of the Scholiasts puts it, 'nota etiam ex hoc capite, aliud esse in factum, et aliud utilem Aquiliam; utilis quidem Aquilia est in factum, at in factum non est utilis Aquilia; haec enim latius patet et aliis casibus competit'. There seems to be no other difference between the two remedies, and, in particular, none in respect of their material result, though some writers maintain that by the actio in factum only simple damages were recoverable, but that the actio utilis was penal in both senses of the lex Aquilia, § 9 supr. and note. For this there is no textual authority, and the expression actio in factum 'accommodata legi Aquiliae' (Dig. 19. 5. 11, cited supr.) or 'ad exemplum legis Aquiliae' (Dig. 9. 2. 53) is distinctly against it.

The cases to which the penalties of the lex Aquilia were extended by construction, besides that already noticed in the note on p. 527, are as follow:

(1) Indirect killing (corpori, non corpore): 'Celsus autem multum interesse dicit, occiderit, an mortis causam praestiterit, ut qui mortis causam praestiterit, non Aquilia sed in factum actione teneatur. Unde affert eum, qui venenum pro medicamento dederit, et ait causam mortis praestitisse, quemadmodum eum, qui furenti gladium porrexit, nam nec hunc lege Aquilia teneri, sed in factum' Dig. 9. 2. 7. 6. For this the text before us prescribes actio utilis: cf. Dig. ib. 9. 3; ib. 11. 1.

(2) Indirect damage other than killing (corpori, non corpore): for examples see the text, and Dig. 9. 2. 11. 5; ib. 29. 5; ib. 30. 3; 9. 1. 1. 7; 19. 5. 14. 3. For the limitation of these classes of wrong by the requirement of a positive act see on § 6 supr.

(3) Cases in which damnum is not done corpori, so that properly speaking there is no rei corruptio at all; viz. (*a*) the wrongful deprivation of property without animus lucri faciendi, e. g. the case of actio in factum cited in this section: the knocking of money out of a person's hand; the throwing of a res aliena into the sea, Dig. 19. 5. 14. 2, cited on Tit. 1. 1 supr.: cf. Dig. 9. 2. 27. 21; 4. 3. 7. 7; (*b*) the depreciation of property without actually damaging it: 'item si quis frumento arenam vel aliud quid immiscuerit, ut difficilis separatio sit, quasi de corrupto agi poterit' Dig. 9. 2. 27. 20; (*c*) the wrongful consumption of res quae usu consumuntur belonging to another: 'si quis alienum vinum vel frumentum

sed si non corpore damnum fuerit datum neque corpus laesum fuerit, sed alio modo damnum alicui contigit, cum non sufficit neque directa neque utilis Aquilia, placuit eum qui obnoxius fuerit in factum actione teneri: veluti si quis misericordia ductus alienum servum compeditum solverit, ut fugeret.

IV

DE INIURIIS

Generaliter iniuria dicitur omne quod non iure fit: specialiter alias contumelia, quae a contemnendo dicta est, quam Graeci *ὕβριν* appellant, alias culpa, quam Graeci *ἀδίκημα* dicunt, sicut in lege Aquilia damnum iniuria accipitur, alias iniquitas et iniustitia, quam Graeci *ἀδικίαν* vocant. cum enim praetor vel iudex non iure contra quem pronuntiat, iniuriam accepisse

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consumpserit, non videtur damnum iniuria dare, ideoque utilis danda est actio' Dig. ib. 30. 2. It is apparently to such cases of actual damage, depreciation, or consumption of property, that the expression in the text (sed alio modo damnum alicui contigit) must be restricted, for it is hardly conceivable that a penal action lay wherever mere loss was occasioned by another's culpa.

(4) Personal injury to a free man: 'liber homo suo nomine utilem Aquiliae habet actionem, directam enim non habet, quoniam dominus membrorum suorum nemo videtur' Dig. 9. 2. 13 pr. For injuries to a filiusfamilias the pater could sue, Dig. ib. 7 pr.

Tit. IV. Having given the general sense of the term iniuria as 'omne quod iure non fit' (cf. Tit. 3. 2 supr.), Justinian points out three more specific significations which it bears (specialiter alias . . . . alias . . . . alias), viz. (1) *ὕβρις* or contumelia, the sense in which it is used in this Title; (2) culpa or *ἀδίκημα*, as where one speaks of damnum iniuria datum under the lex Aquilia; and (3) *ἀδικία* or injustice, sensu stricto, in one whose function it is 'ius pronuntiare', such as a judge or a magistrate.

The delict of iniuria here treated may be defined as a wilful violation of what writers on Jurisprudence term the 'primordial' rights of a free man—the rights to personal freedom, safety, and reputation. It thus stands in marked contrast with the three delicts already discussed, all of which are offences against property, though the same act may be construable as an offence against both the property and the person: 'et ideo interdum utraque actio concurrit, et legis Aquiliae, et iniuriarum: sed duae erunt aestimationes, alia damni, alia contumeliae' Dig. 9. 2. 5. 1: cf. Dig. 47. 10. 15. 46.

Intention is essential to iniuria: 'pati quis iniuriam etiamsi non sentiat potest, facere nemo, nisi qui scit se iniuriam facere, etiamsi nesciat cui

dicitur. **Iniuria autem committitur non solum, cum quis** 1 G.iii.220.
pugno puta aut fustibus caesus vel **etiam verberatus erit, sed etiam si cui convicium factum fuerit, sive cuius bona quasi debitoris** possessa fuerint ab eo, qui intellegebat **nihil eum sibi debere,** vel **si quis ad infamiam alicuius libellum aut carmen scripserit** composuerit ediderit dolove malo fecerit, quo quid eorum fieret, **sive quis matrem familias aut praetextatum** praetextatamve **adsectatus fuerit,** sive cuius pudicitia attemptata esse dicetur: **et denique aliis pluribus modis** admitti iniuriam manifestum est. **Patitur autem quis iniuriam** 2 G.iii.221.
non solum per semet ipsum, sed etiam per liberos suos quos

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faciat' Dig. 47. 10. 3. 2; hence those were held incapable of committing iniuria who could not have such intention, e. g. persons of weak or unsound mind, and children not yet doli capaces.

§ 1. The second condition of iniuria is an overt act, which, as is said in the text, might be directed against the person or the reputation: 'iniuriam autem fieri Labeo ait aut re, aut verbis: re, quotiens manus inferuntur, verbis autem, quotiens non manus inferuntur, convicium fit: omnemque iniuriam aut in corpus inferri, aut ad dignitatem aut ad infamiam pertinere' Dig. 47. 10. 1. 1 and 2. Among acts which amount to iniuria, besides those mentioned in the text, are calling upon sureties to discharge a debt which the debtor is quite able and willing to pay himself, Dig. ib. 19 and 20; offering for sale another's property under the pretence that one has a mortgage over it, ib. 15. 32 and 33; the publication of a will whose provisions one should have kept secret, Dig. 9. 2. 41 pr.; unwarranted entry upon another man's dwelling against his will, Dig. 47. 10. 5 pr.; hindering another in the use of a 'res publico usui destinata' ib. 13. 7, and unjustifiable questioning of another's status, ib. 11. 9.

The technical name for libel is carmen or libellus famosus; for slander there seems to have been no other term but convicium, which includes acts which we should call by other names. If such statements were true, and not made in an offensive manner, they did not amount to iniuria: 'eum qui nocentem infamavit, non esse bonum aequum ob eam rem condemnari: peccata enim nocentium nota esse et oportere et expedire' Dig. 47. 10. 18 pr. For the liability of instigators and accomplices see § 11 inf. and Paulus, Sent. Rec. 5. 4. 20 'non tantum is, qui maledictum aut convicium ingesserit iniuriam convictus famosus efficitur, sed et is cuius ope consiliove factum esse dicitur'.

§ 2. In Gaius iii. 221 it is said that the husband can suffer iniuria through the wife in manu; but this has been emended (perhaps rightly, considering the words which follow) by reference to Justinian's text, so as to read 'immo etiam per uxores, quamvis in manu nostra non sint, id enim magis praevaluit'. The actio iniuriarum was one of the few actions which

in potestate habet: item per uxorem suam, id enim magis praevaluit. **itaque si filiae alicuius, quae Titio nupta est, iniuriam feceris, non solum filiae nomine tecum iniuriarum agi potest, sed etiam patris quoque et mariti nomine.** contra autem, si viro iniuria facta sit, uxor iniuriarum agere non potest: defendi enim uxores a viris, non viros ab uxoribus aequum est. sed et socer nurus nomine, cuius vir in po-

G.iii.222. 3 testate est, iniuriarum agere potest. **Servis autem ipsis quidem nulla iniuria fieri intellegitur, sed domino per eos fieri videtur: non tamen isdem modis, quibus etiam per liberos et uxores, sed ita cum quid atrocius commissum fuerit et quod aperte ad contumeliam domini respicit. veluti si quis alienum servum verberaverit, et in hunc casum actio proponitur: at si quis servo convicium fecerit vel pugno eum percusserit, nulla**

4 **in eum actio domino competit.** Si communi servo iniuria facta sit, aequum est non pro ea parte, qua dominus quisque est, aestimationem iniuriae fieri, sed ex dominorum persona,

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a person in power was able to bring in his or her own name, Dig. 44. 7. 9, p. 127 supr. As a general rule, iniuria to A would not affect B unless it was so intended; but where the relation between the two was intimate, and such as to have been known to the delinquent, the intention was presumed: 'maritus in uxoris pudore, pater in existimatione filiarum propriam iniuriam pati intelleguntur' Cod. 9. 35. 2.

§ 3. No iniuria could, properly speaking, be offered to a slave, because he was ἀπρόσωπος; but the praetor seems to have demurred to the civil law fiction that a slave had no feelings: 'si . . . . non ad suggillationem domini fecit, ipsi servo facta iniuria inulta a praetore relinqui non debuit: hanc enim et servum sentire palam est' Dig. 47. 10. 15. 35: cf. Dig. 21. 1. 43. 5, and note on Bk. i. 3. 2 supr.

It is doubtful whether the 'et' between 'atrocius commissum' and 'quod aperte . . . . respicit' should be taken as conjunctive or disjunctive. In favour of the former view is Gaius (iii. 222), who omits the particle, and perhaps Theophilus (καὶ ὅπερ), but the latter is supported by general principles and Dig. 47. 10. 15. 35, according to which even slight iniuria, if aimed at the dominus, was actionable.

§ 4. This seems hardly reconcileable with Dig. 47. 10. 16, which says that no joint owner was entitled to a share in the damages in excess of the share which he held in the slave. Perhaps the meaning is that the judge should consider not only the shares, but also the dignitas, of the joint owners: so that if a more honourable and a less honourable man own a slave in moieties, and the former could recover 100*l.* if he were sole dominus, while the latter, under the same supposition, would get only 50*l.*, the judge ought to award 50*l.* to the one, and 25*l.* to the other.

quia ipsis fit iniuria. Quodsi usus fructus in servo Titii est, 5
proprietas Maevii est, magis Maevio iniuria fieri intellegitur.
Sed si libero, qui tibi bona fide servit, iniuria facta sit, nulla 6
tibi actio dabitur, sed suo nomine is experiri poterit: nisi in contumeliam tuam pulsatus sit, tunc enim competit et tibi iniuriarum actio. idem ergo est et in servo alieno bona fide tibi serviente, ut totiens admittatur iniuriarum actio, quotiens in tuam contumeliam iniuria ei facta sit.

Poena autem iniuriarum ex lege duodecim tabularum 7 G. iii. 223.
propter membrum quidem ruptum talio erat: propter os vero fractum nummariae **poenae erant constitutae** quasi **in magna** veterum **paupertate. sed postea praetores permittebant ipsis** G. iii. 224.

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§ 5. But if the insult was intended to be offered to Titius, he could sue, Dig. 47. 10. 15. 48.

§ 7. To fractum Gaius (iii. 223) adds 'aut collisum'. The difference between membrum ruptum and os fractum is not clear; if we may rely on the interpretation of ruptum under the lex Aquilia as corruptum, the former is intended to express permanent disablement, but it seems better to take membrum to mean one of the extremities (head, arm, or leg), and by os to understand bones in the body or trunk. The penalty in such cases (the exaction of which was permitted by the statute to the nearest relative of the injured person, 'talione proximus cognatus ulciscitur' Cato in Priscian 6. 710) was a limb for a limb only if the parties were unable to agree as to compensation: 'si membrum rupit, ni cum eo pacit, talio esto' (Twelve Tables in Festus); but it would seem that the delinquent could resist talio if he pleased, and insist on a judicial fine: 'si reus, qui depacisci noluerat, iudici talionem imperanti non parebat, aestimata lite iudex hominem pecunia damnabat' Gell. 20. 1. The pecuniary penalties fixed by the Twelve Tables were 300 asses if the broken bone were a free man's, 150 if it were a slave's; for all other iniuriae 25 asses, Gaius loc. cit. That the grossest libel could be atoned for by payment of this small sum argues the old Romans to have been not over sensitive to abuse, unless it took the form of ribald songs, in which case the penalty of death, fustuarium supplicium, was ordained by the Twelve Tables; cf. Cic. de Republ. 4. 10, Tusc. 4. 2. After the introduction of the praetorian penalties, the sum to be paid in cases of atrox iniuria (§ 9 inf.) was in Gaius' time practically fixed by the praetor, Gaius iii. 224. That Justinian does not mention this is perhaps to be accounted for by supposing that atrox iniuria was usually proceeded against either criminally, § 10 inf., or under the lex Cornelia, § 8 inf. The praetorian action could be brought only within an annus utilis of the commission of the offence, Cod. 9. 35. 5, and condemnation entailed infamia, Tit. 16. 2 inf. The right of action was extinguished by the death either of the person injured, or of the delinquent, the wrong being purely personal, Dig. 47. 10.

qui **iniuriam** passi sunt **eam aestimare,** ut **iudex vel tanti condemnet, quanti** iniuriam passus **aestimaverit, vel minoris prout ei visum fuerit.** sed poena quidem iniuriae, quae ex lege duodecim tabularum introducta est, in desuetudinem abiit: quam autem praetores introduxerunt, quae etiam honoraria appellatur, in iudiciis frequentatur. nam secundum gradum dignitatis vitaeque honestatem crescit aut minuitur aestimatio iniuriae: qui gradus condemnationis et in servili persona non immerito servatur, ut aliud in servo actore, aliud in medii actus homine, aliud in vilissimo vel compedito con-
8 stituatur. Sed et lex Cornelia de iniuriis loquitur et iniuriarum actionem introduxit. quae competit ob eam rem, quod se pulsatum quis verberatumve domumve suam vi introitam esse dicat. domum autem accipimus, sive in propria domo quis habitat sive in conducta vel gratis sive hospitio receptus
G.iii.225. 9 sit. **Atrox iniuria aestimatur vel ex facto, veluti si quis ab aliquo vulneratus fuerit vel fustibus caesus: vel ex loco, veluti si cui in theatro vel in foro** vel in conspectu praetoris **iniuria facta sit: vel ex persona, veluti si magistratus iniuriam passus fuerit, vel** si **senatori ab humili iniuria facta sit,** aut parenti patronoque fiat a liberis vel libertis: aliter enim senatoris et parentis patronique, aliter extranei et humilis personae iniuria aestimatur. nonnumquam et locus vulneris atrocem iniuriam

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13 pr.; this of course must be understood to mean that the action was neither actively nor passively transmissible; the former, perhaps, because in many cases more than one person could sue on the same iniuria.

§ 8. Whether this lex Cornelia, passed by Sulla B. C. 81, was confined to iniuriae, or was only a part of a larger statute, perhaps the lex Cornelia de sicariis, Tit. 18. 5 inf., is doubtful; the former view is supported by the fulness with which it seems to have treated iniuria, Dig. 47. 10. 5. 6–8; 48. 2. 12. 4. Its original object in any case was the criminal prosecution of the acts of violence to which it related ('apparet igitur omnem iniuriam, quae manu fiat, lege Cornelia contineri' Dig. 47. 10. 5 pr.), but by gradual usage a civil action was developed under its provisions, which, though its scope was less than that of the older praetorian remedy, had the advantage of being perpetua, i. e. not barred by lapse of a year: 'etiam ex lege Cornelia iniuriarum actio civiliter moveri potest, condemnatione aestimatione iudicis facienda' Dig. 47. 10. 37. 1. The criminal proceedings under this statute apparently went out of use, Dig. 3. 3. 42. 1.

§ 9. Gaius (iii. 223) and Paulus (Sent. Rec. 5. 4. 10) do not mention the position of the wound as sufficient to make an iniuria atrox.

facit, veluti si in oculo quis percussus sit. parvi autem refert, utrum patri familias an filio familias talis iniuria facta sit: nam et haec atrox aestimabitur. In summa sciendum est 10
de omni iniuria eum qui passus est posse vel criminaliter agere vel civiliter. et si quidem civiliter agatur, aestimatione facta secundum quod dictum est poena imponitur. sin autem criminaliter, officio iudicis extraordinaria poena reo irrogatur: hoc videlicet observando, quod Zenoniana constitutio introduxit, ut viri illustres quique supra eos sunt et per procuratores possint actionem iniuriarum criminaliter vel persequi vel suscipere secundum eius tenorem, qui ex ipsa manifestius apparet. Non solum autem is iniuriarum tenetur qui fecit 11
iniuriam, hoc est qui percussit: verum ille quoque continebitur, qui dolo fecit vel qui curavit, ut cui mala pugno percuteretur. Haec actio dissimulatione aboletur: et ideo, si 12
quis iniuriam dereliquerit, hoc est statim passus ad animum suum non revocaverit, postea ex paenitentia remissam iniuriam non poterit recolere.

V

DE OBLIGATIONIBUS QUAE QUASI EX DELICTO NASCUNTUR

Si iudex litem suam fecerit, non proprie ex maleficio obligatus videtur. sed quia neque ex contractu obligatus est et

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§ **10**. Criminal prosecution of iniuria was not under any recognized iudicium publicum, hence the necessity of an extraordinaria poena (cf. the passage cited from Dig. 47. 2. 92 on Tit. 1. 19 supr.), though some forms of it would come under specific statutes, e. g. the leges Iuliae de adulteriis, Tit. 18. 4 inf., and de vi, ib. 8: Cornelia de sicariis, ib. 5, or Fabia de plagiariis, ib. 10. Hermogenian (Dig. 47. 10. 45) speaks of the prosecution as ordinarily preferred in his day to the civil remedy. The ranks higher than illustris were those of consulares and patricii. For Zeno's constitution cf. Paul. Sent. Rec. 5. 4. 12 'iniuriarum non nisi praesentes accusare possunt: crimen enim, quod vindictae aut calumniae iudicium expectat, per alios intendi non potest', Dig. 48. 1. 13. 1 'ad crimen iudicii publici persequendum frustra procurator intervenit, multoque magis ad defendendum'.

§ **12**. For this use of dissimulatio cf. Dig. 23. 4. 27, Cod. 2. 22. 1; 7. 13. 3. The meaning seems to be arrived at by supposing that a person who, after at first letting an iniuria go by, then brings his action, 'dissembled' his anger. The reason of the rule is that the actio iniuriae 'ex bono et aequo est' Dig. 47. 10. 11. 1.

Tit. V. These obligations quasi ex delicto are of two kinds; (1) cases

utique peccasse aliquid intellegitur, licet per imprudentiam: ideo videtur quasi ex maleficio teneri, et in quantum de ea re aequum religioni iudicantis videbitur, poenam sustinebit.
1 Item is, ex cuius cenaculo vel proprio ipsius vel conducto vel in quo gratis habitabat deiectum effusumve aliquid est, ita ut alicui noceretur, quasi ex maleficio obligatus intellegitur: ideo autem non proprie ex maleficio obligatus intellegitur, quia plerumque ob alterius culpam tenetur aut servi aut liberi. cui

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of vicarious responsibility, imposed by the law upon a man 'quod opera malorum hominum utitur', or because it may be difficult to ascertain the real offender, and (2) wrongs which result directly from a man's own culpa, but which do not come under the definition of any of the four delicts proper. The actions by which they are redressed being bilaterally penal, except perhaps in one case, they partake of the character of genuine delicts; a category from which (as Mr. Poste remarks) they are excluded apparently only because they fall under no certain statute, or are recent additions to the code.

That the incompetence of a surgeon was a delict (Tit. 3. 7 supr.), while that of a judge was not, was due to the wording of the lex Aquilia, the action under which did not lie except in cases of damage to tangible objects: 'iudex tunc litem suam facere intellegitur, cum dolo malo in fraudem legis sententiam dixerit. Dolo malo autem videtur hoc facere, si evidens arguatur eius vel gratia vel inimicitia vel etiam sordes, ut veram aestimationem litis praestare cogatur' Dig. 5. 1. 15. 1. Where his offence was only imprudentia it must have been more lightly visited, the judge here having a discretion '. . . . quantum aequum religioni iudicantis videbitur'.

§ 1. 'Praetor ait de his, qui deiecerint vel effuderint, unde in eum locum quo vulgo iter fiet, vel in quo consistetur, deiectum vel effusum quid erit, quantum ex ea re damnum datum factumve erit, in eum, qui ibi habitaverit, in duplum iudicium dabo' Dig. 9. 3. 1 pr. The action for the recovery of the penalty was popularis (cf. Bk. i. 26. 3 and note, supr.) if the offence resulted in the death of a free man—'dummodo sciamus, ex pluribus desiderantibus haec actionem ei potissimum dari debere, cuius interest, vel qui adfinitate cognationeve defunctum contingit' Dig. ib. 5. 5; like penal actions in general, it was not passively transmissible, and the time within which it could be brought was limited to an annus utilis. A free man who was only injured could sue at any length of time from the occurrence, and in such cases the action seems also to have been popularis for a year: 'sed si libero nocitum est, ipsi perpetua erit actio; sed si alius velit experiri annua erit haec actio, nec enim heredibus iure hereditario competit, quippe quod in corpore libero damni datur, iure hereditario transire ad successores non debet, quasi non sit damnum pecuniarium, nam ex bono et aequo oritur' Dig. loc. cit.

If the occupier of the house were cast in an actio de effusis vel deiectis,

similis est is, qui ea parte, qua vulgo iter fieri solet, id positum aut suspensum habet, quod potest, si ceciderit, alicui nocere: quo casu poena decem aureorum constituta est. de eo vero quod deiectum effusumve est dupli quanti damnum datum sit constituta est actio. ob hominem vero liberum occisum quinquaginta aureorum poena constituitur: si vero vivet nocitumque ei esse dicetur, quantum ob eam rem aequum iudici videtur, actio datur: iudex enim computare debet mercedes medicis praestitas ceteraque impendia, quae in curatione facta sunt, praeterea operarum, quibus caruit aut cariturus est ob
id quod inutilis factus est. Si filius familias seorsum a patre 2
habitaverit et quid ex cenaculo eius deiectum effusumve sit, sive quid positum suspensumve habuerit, cuius casus periculosus est: Iuliano placuit in patrem nullam esse actionem, sed cum ipso filio agendum. quod et in filio familias iudice
observandum est, qui litem suam fecerit. Item exercitor 3

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he could recover by actio in factum from the actual delinquent unless he were his slave or filiusfamilias, in which case he could usually pay the damages from the peculium, Dig. ib. 5. 4.

For the actio positi aut suspensi cf. Dig. 9. 3. 5. 6, 'praetor ait, ne quis in suggrunda protectove supra eum locum, quo vulgo iter fiet inve quo consistetur, id positum habeat, cuius casus nocere cui possit; qui adversus ea fecerit, in eum solidorum decem in factum iudicium dabo'. The action was popularis, Dig. ib. 13, and its object, besides the recovery of the penalty, was the removal of the danger, i. e. it lay before any damage was actually done.

§ 2. In this case no action whatever could be brought against the father in the first instance, 'neque de peculio neque noxalem' Dig. 44. 7. 5. 5, 'de peculio non datur, quia non ex contractu venit' Dig. 9. 3. 1. 7. But if judgment were recovered against the filiusfamilias the pater was liable to the actio iudicati, and must pay to the extent of the peculium; at least this was the rule in delicts proper: 'quotiens nemo filiumfamilias ex causa delicti defendit, in eum iudicium datur; et si condemnatus fuerit, filius iudicatum facere debet, tenet enim condemnatio. Quin immo etiam illud dicendum est, patrem quoque post condemnationem duntaxat de peculio posse conveniri' Dig. 9. 4. 34 and 35. If the dangerous object had been positum or suspensum by a slave without the master's knowledge, the praetor had allowed a noxal action, Dig. 9. 3. 1 pr.; ib. 5. 6, and doubtless the practice had been the same with children in power; for this subject see Tit. 8 and notes inf.

§ 3. The penalty to which shipowners, inn- and stable-keepers were liable for such delicts of their *employés* was twice the value of the property stolen or damaged, Dig. 4. 9. 7. 1; 47. 5. 2. The same classes of persons

navis aut cauponae aut stabuli de dolo aut furto, quod in nave aut in caupona aut in stabulo factum erit, quasi ex maleficio teneri videtur, si modo ipsius nullum est maleficium, sed alicuius eorum, quorum opera navem aut cauponam aut stabulum exerceret: cum enim neque ex contractu sit adversus eum constituta haec actio et aliquatenus culpae reus est, quod opera malorum hominum uteretur, ideo quasi ex maleficio teneri videtur. in his autem casibus in factum actio competit, quae heredi quidem datur, adversus heredem autem non competit.

VI

DE ACTIONIBUS

G. iv. 1. **Superest, ut de actionibus loquamur.** actio autem nihil aliud est, quam ius persequendi iudicio quod sibi debetur.

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were bound quasi ex contractu to restore in safety and uninjured the property of travellers and others which was placed in their custody (receptum nautarum, cauponum et stabulariorum), unless the loss was occasioned by vis maior, unavoidable accident, or contributory negligence of the owner: 'ait praetor, nautae, caupones, stabularii, quod cuiusque salvum fore receperint, nisi restituent, in eos iudicium dabo' Dig. 4. 9. 1 pr.

There is apparently no reason why the liability of masters for their slaves' delicts in general (Tit. 8 inf.) and of owners of animals for damage done by them (Tit. 9) should not be considered as arising quasi ex delicto, for it was enforced by special actions, which were at least as penal as that against the judge 'qui litem suam fecerit'. The fact seems to be that the cases mentioned in this Title are intended only as examples of quasi-delictal obligation, and that the other two would naturally have found a place among them but for Justinian's inveterate habit of following the arrangement of Gaius. As the latter does not treat the subject at all, he discusses the liability of masters and fathers for the delicts of their slaves and children in power in close connection with a cognate question—their liability upon their contracts; so that Justinian, in his anxiety to adhere to the latter arrangement, has committed a fault of classification.

Before proceeding to the subject of actions in the next Title, it is recommended that the student should read the Excursus at the end of this Book on the earlier history of Roman civil procedure.

Tit. VI. Actio is a term which has a variety of meanings, more or less cognate to one another. From signifying a mere act (as in Dig. 48. 1. 7) it becomes limited to a processual act, an act done as part of a judicial

Omnium actionum, quibus inter aliquos apud iudices arbitrosve de quaque re quaeritur, summa divisio in **duo genera** deducitur: aut enim **in rem** sunt aut **in personam.** namque agit unusquisque aut cum eo, **qui ei obligatus est vel ex contractu vel ex maleficio,** quo casu proditae actiones **in per-** 1 G. iv. 2

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proceeding, whether by one of the parties (Gaius iv. 11 sq., Dig. 1. 2. 2. 6) or by the magistrate (Dig. 1. 7. 4). In Dig. 47. 20. 1 it indicates a public prosecution, and in Cod. 10. 1. 6 it is used altogether improperly in the sense of an evidentiary document.

But by far its commonest senses are two in number: (1) as here in the text, it means 'a right of action'. The expression 'ius persequendi quod sibi debetur' at first might be taken to imply that actio is here used as equivalent to actio in personam, for it is difficult to represent a person who denies one's right to property as 'owing' one a debt; but it is plain from the next paragraph that Justinian is using actio in its widest sense: cf. Dig. 50. 16. 178. 3 'hoc verbum "debuit" omnem omnino actionem comprehendere intellegitur'. (2) The actual exercise of such right of action (as in the expressions actionem dare, denegare, actione experiri), or, more generally, a 'legal remedy'. This sense in some passages is narrower than in others; its extension in fact is threefold: (*a*) in its narrowest signification it denotes an actio in personam as distinct from an actio in rem (p. 346 supr.), and here there is a close correlation between actio and obligatio; for every personal action asserts a right in personam, and presupposes an obligatio. A real action, on the other hand, though brought against a definite person, does not (as is remarked in § 1) presuppose any 'vinculum iuris' between plaintiff and defendant; the latter is sued, not because he 'owes' anything, properly speaking, but because he will not recognize a right which the plaintiff has and can assert against the world. After such action has been definitely commenced, the parties are in a sense bound to one another (Gaius iii. 180); but the action does not originate in an obligatio as personal actions do. (*b*) Somewhat more widely, actio denotes a judicial proceeding which (in the formulary period) commenced with a formula, in contradistinction to interdicts and the extraordinaria cognitio: and (*c*) finally, in some passages it bears the sense of any legal remedy whatsoever: 'actionis verbo continetur in rem, in personam, directa, utilis, praeiudicium, sicut ait Pomponius stipulationes etiam, quae praetoriae sunt, quia actionum instar obtinent, ut damni infecti, legatorum, et si quae similes sunt. Interdicta quoque actionis verbo continentur' Dig. 44. 7. 37, 'integri restitutio est redintegrandae rei vel causae *actio*' Paul. Sent. Rec. 1. 7. 1, 'agere etiam is videtur, qui exceptione utitur, nam reus in excipiendo actor est' Dig. 44. 1. 1: but cf. Dig. 50. 16. 8. 1 'actionis verbo non continetur exceptio'.

§ 1. The distinction of actions into real and personal is based in origin on difference of formula (Excursus X inf.), to which there is an obvious

sonam sunt, per quas **intendit** adversarium ei **dare** aut dare **facere oportere** et aliis quibusdam modis: aut cum eo agit, qui nullo iure ei obligatus est, movet tamen alicui de aliqua G. iv. 3. re controversiam. quo casu proditae actiones **in rem** sunt. veluti si rem corporalem possideat quis, quam Titius suam esse affirmet, et possessor dominum se esse dicat: nam si Titius suam esse intendat, **in rem actio est.**

2 Aeque si agat ius sibi esse fundo forte vel aedibus **utendi fruendi** vel per fundum vicini **eundi agendi** vel ex fundo vicini **aquam ducendi, in rem actio est.** eiusdem generis est actio de iure praediorum urbanorum, veluti si agat ius sibi esse **altius** aedes suas **tollendi prospiciendive** vel proiciendi aliquid vel immittendi in vicini aedes. contra quoque de usu fructu et de servitutibus praediorum rusticorum, item praediorum urbanorum invicem quoque proditae sunt actiones, ut quis intendat ius non esse adversario utendi fruendi, eundi agendi aquamve ducendi, item altius tollendi prospiciendi proiciendi immittendi: istae

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reference in Justinian's words 'intendit . . . dare facere oportere', '(rem) suam esse intendat', which, however, have no technical meaning in the text, but merely describe in general terms the plaintiff's contention, as expressed in the libellus conventionis, or writ of summons by which the action was commenced. Other differences, e. g. in procedure, and in the nature of the security to be given by the parties (Tit. 11 inf.), have now disappeared, and a real differs from a personal action only in the nature of the right for whose protection it is brought: the opposition is material only, not formal. It will be found that in § 20 inf. Justinian interposes a third class—actiones mixtae—between actions which are real and those which are personal.

§ 2. For the rights to which the remedies described in this section relate see Bk. ii. Titles 3–5 and notes supr. The actio confessoria, affirming a right of servitude in the plaintiff, lay not only against the dominus of the res serviens, but against any one by whom the right was infringed, and its objects were recognition of the right and damages for its infringement: in form it was arbitraria (§ 31 inf.). In many cases, especially of praedial servitudes, the person entitled was not limited to this remedy, but could use an interdict, and thereby compel the dominus, if he wished to contest the right, to bring the actio negatoria. By this he asserted the freedom of his property from the servitude affirmed by the other; its object being restoration of the property itself (if the other claimed a use or usufruct) or cessation of the act by which the rights of ownership had been interfered with; damages for what had been done, and security by stipulation against its repetition. For these actions generally cf. Mr. Poste's note on Gaius iv. 3.

quoque actiones in rem sunt, sed **negativae.** quod genus actionis in controversiis rerum corporalium proditum non est: nam in his is agit qui non possidet: ei vero qui possidet non est actio prodita, per quam neget rem actoris esse. sane uno casu qui possidet nihilo minus actoris partes optinet, sicut in latioribus digestorum libris opportunius apparebit. Sed istae 3
quidem actiones, quarum mentionem habuimus, et si quae sunt similes, ex legitimis et civilibus causis descendunt. aliae autem sunt, quas praetor ex sua iurisdictione comparatas habet tam in rem quam in personam, quas et ipsas necessarium est exemplis ostendere. ecce plerumque ita permittit in rem agere, ut vel actor diceret se quasi usu cepisse, quod usu non ceperit, vel ex diverso possessor diceret adversarium suum usu non cepisse quod usu ceperit. Namque si cui ex iusta causa res 4 Cf. G. iv. 36.
aliqua tradita fuerit, veluti ex causa emptionis aut donationis aut dotis aut legatorum, necdum eius rei dominus effectus est, si eius rei casu possessionem amiserit, nullam habet directam in

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The single case referred to at the end of the section, in which a possessor can be plaintiff in a real action, and of which Justinian says fuller information may be found in the Digest, may be either where a person, though not ceasing to 'possess' his property, has given it as precarium to another, Dig. 43. 26. 15. 4: or where one person possesses ex iusta causa (i.e. as dominus) and another vi aut clam, but not from him (so that the interdict Uti possidetis does not lie), Dig. 43. 17. 3 pr.; or where a civil possessor brings vindicatio against another who has detention in his name, Dig. 6. 1. 9; 7. 9. 7 pr.

§ 3. For the history of the distinction here drawn between actiones civiles or legitimae, and actiones honorariae (the latter comprising the two classes of utiles and in factum), see Excursus X. Actiones honorariae in rem are exemplified in §§ 3–7, in personam in §§ 8–12 inf.

By possessor at the end of this section can only be meant 'is qui olim possederat' (referring to § 5 inf.), cf. domino for 'ei qui dominus fuerat' in § 5.

§ 4. The actio Publiciana was the proper remedy of any one who had commenced the usucapion of property without being able to complete it because some other person had obtained possession, and so interrupted its operation, before his title had become indefeasible, p. 197 supr. The conditions of success were as follow:

(1) The object must be capable of being acquired by usucapio or prescription, Dig. 6. 2. 9. 5.

(2) The plaintiff must have had possession: 'ante traditionem, quamvis bonae fidei quis emptor est, experiri Publiciana non poterit' Dig. ib. 7. 16. By the edict the possession must have been acquired by

rem actionem ad eam rem persequendam: quippe ita proditae sunt iure civili actiones, ut quis dominium suum vindicet. sed quia sane durum erat eo casu deficere actionem, inventa est a praetore actio, in qua dicit is, qui possessionem amisit, eam rem se usu cepisse et ita vindicat suam esse. quae actio Publiciana appellatur, quoniam primum a Publicio praetore in edicto proposita est. Rursus ex diverso si quis, cum rei publicae causa abesset vel in hostium potestate esset, rem eius

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traditio: 'ait praetor, si quis id, quod traditur ex iusta causa non a domino et nondum usucaptum petet, iudicium dabo' Dig. ib. 1; but by construction the remedy was extended to modes of acquiring possession generally: 'quaecunque sunt iustae causae adquirendarum rerum, si ex his causis nacti res amiserimus, dabitur nobis earum rerum persequendarum gratia haec actio' Dig. ib. 13 pr. This rule, however, does not apply in those exceptional cases (e. g. sometimes in legatum) where ownership vested without possession being actually delivered, Dig. ib. 1. 2; ib. 7 pr. Moreover, the possession must be usucapion possession: it must have been derived ex iusta causa (p. 226 supr.), Gaius iv. 36, and be accompanied by bona fides, Dig. 6. 2. 3. 1; ib. 7. 11–16; 9. 4. 28: whether throughout its continuance, or only at its inception, is matter of doubt.

(3) The action can be brought with success only against a defendant who possesses with less right than the plaintiff, and therefore neither against the dominus, Dig. 6. 2. 16 and 17 (unless the case is one in which, supposing the owner brought vindicatio against the possessor, he could be repelled by a iusta exceptio, e. g. doli, rei venditae et traditae, or rei iudicatae), nor against any other person whose possession is as righteous in respect of bona fides, iusta causa, etc., as the plaintiff's had been, unless both derived their possession from the same person, Dig. 6. 2. 9. 4.

The actio Publiciana could be used to establish servitudes no less than dominium: 'si de usufructu agatur traditio, Publiciana datur, itemque servitutibus urbanorum praediorum per traditionem constitutis, vel per patientiam, forte si per domum quis suam passus est aquaeductum transduci: item rusticorum, nam et hic traditionem et patientiam tuendam constat' Dig. 6. 2. 11. 1. The Publicius by whom the action was introduced can hardly have been the Quintus Publicius who is mentioned by Cicero as having been praetor circ. B.C. 66, pro Cluent. 45, because he was not praetor urbanus. It was in existence certainly in the time of Neratius, Dig. 6. 2. 9. 3. and 17, who was consul before the end of the first century.

§ 5. In the case here supposed the title conferred by a completed usucapion is rescinded or cancelled by in integrum restitutio (note on § 33 inf.), and the plaintiff establishes his right by an ordinary vindicatio or Publiciana according to the precise nature of his interest: the assumption

qui in civitate esset usu ceperit, permittitur domino, si possessor rei publicae causa abesse desierit, tunc intra annum rescissa usucapione eam petere, id est ita petere, ut dicat possessorem usu non cepisse et ob id suam esse rem. quod genus actionis et aliis quibusdam simili aequitate motus praetor accommodat, sicut ex latiore digestorum seu pandectarum volumine intellegere licet. Item si quis in fraudem 6
creditorum rem suam alicui tradiderit, bonis eius a creditoribus ex sententia praesidis possessis permittitur ipsis creditoribus rescissa traditione eam rem petere, id est dicere eam rem traditam non esse et ob id in bonis debitoris mansisse. Item 7

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by some writers of an independent action (rescissoria or contraria Publiciana) has no foundation. The text speaks only of protection *against* an absent person; but the principle was applied equally in favour of those whose property, while they were absent rei publicae causa, had been acquired per usucapionem, Dig. 4. 6. 23. 3; cf. the note on in integrum restitutio, § 33 inf. For the old annus utilis Justinian substituted in all cases of in integrum restitutio a quadriennium continuum, Cod. 2. 52. 7. The references at the end of the paragraph are to Dig. 4. 6. 1. 1; ib. 21. pr.; ib. 26. 8; 17. 1. 57; 44. 7. 35. pr.

§ 6. The iusta causa of the in integrum restitutio in this case is the dolus of the alienee, and the creditors' action, as seems clear from the text, is in rem: though it is difficult to see why after restitutio there was any necessity for a fiction: cf. Bk. iii. 10. 3 and notes supr. Whether the action (as Theophilus says) was called Pauliana is disputed: it is certain that there was a personal action of the same name, and lying under similar circumstances. So far as can be elicited from the authorities, it seems probable that the creditors had, as against fraudulent alienation by the debtor (including wrongful payment of one or some of them in full when he was aware of his insolvency), (1) an actio Pauliana in personam, Dig. 22. 1. 38. 4, (2) an interdictum fraudatorium, Dig. 36. 1. 69. 1, (3) an actio in factum available against a bona fide alienee, Dig. 42. 8. 10. pr., (4) the in integrum restitutio mentioned in the text, with a view to a real action (Pauliana ?). The relation between these remedies, and the precise purpose for which they were respectively employed, are so variously represented by the commentators that it is impossible here to go further into the question. For the missio in possessionem of creditors upon their debtors' insolvency see p. 388 supr.

§ 7. For pignus and hypotheca see pp. 328–331 supr. By the actiones Serviana and hypothecaria the pledgee was enabled, on proving his right of pledge or hypothec, to recover the property over which it existed or damages against any one in whose possession it was, and he could bring the action even before the day fixed for payment had arrived, Dig. 20. 1. 14. pr. The formula had in the earlier period been arbitraria, and ran

Serviana et quasi Serviana, quae etiam hypothecaria vocatur, ex ipsius praetoris iurisdictione substantiam capit. Serviana autem experitur quis de rebus coloni, quae pignoris iure pro mercedibus fundi ei tenentur: quasi Serviana autem qua creditores pignora hypothecasve persequuntur. inter pignus autem et hypothecam quantum ad actionem hypothecariam nihil interest: nam de qua re inter creditorem et debitorem convenerit, ut sit pro debito obligata, utraque hac appellatione continetur. sed in aliis differentia est: nam pignoris appellatione eam proprie contineri dicimus, quae simul etiam traditur creditori, maxime si mobilis sit: at eam, quae sine traditione nuda conventione tenetur, proprie hypothecae
8 appellatione contineri dicimus. In personam quoque actiones

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somewhat as follows: 'si paret eam rem, de qua agitur, ab eo, cuius in bonis tum fuit (pledgor), Aulo Agerio pignoris nomine obligatam esse pro pecunia, quam illum A^{o}. A^{o}. ex mutuo dare oporteret, eamque pecuniam solutam non esse, neque eo nomine satisfactum esse, neque per A^{m}. A^{m}. stare, quominus solvatur, nisi arbitratu tuo Numerius Negidius A^{o}. A^{o}. restituet aut pecuniam solvat, quanti ea res erit, tanti N^{m}. N^{m}. A^{o}. A^{o}. condemna.'

If the defendant was the pledgor himself, and was condemned in a money payment, its amount could not exceed that of the debt; but if he was a third person, the damages were calculated on the full value of the property, though the plaintiff had to hand over to the pledgor any surplus beyond the amount of the debt, Dig. 20. 1. 21. 3. There was also some difference between this and an ordinary real action in respect of the defendant's liability for fructus, and of some special defences which were here open for him; for by Nov. 4. 2 by which Justinian introduced the beneficium ordinis for sureties, p. 427 supr., a similar beneficium by way of exceptio was established for this case; it being provided that any third person who was in possession of the property pledged could require the pledgee to sue the pledgor and his sureties by personal action before coming upon him with the actio hypothecaria, and that when the debtor as well as his surety had given the creditor hypothecary rights, the creditor could be compelled to resort to those given by the former before he could insist on those given by the latter.

By saying of these actions 'ex ipsius praetoris iurisdictione substantiam capiunt' Justinian means that, unlike those mentioned in the preceding sections, they were not feigned to be civil actions, but were bold innovations (actiones in factum); see Gaius iv. 10, and Excursus X inf. For the pledgee's possessory remedy (interdictum Salvianum) and its relation to the actiones Serviana and hypothecaria see on Tit. 15. 3 inf.

§ **8.** For constitutum see p. 428 supr. Recepticia was an action on the formless promise of a banker to pay the debt of some one else—of course

ex sua iurisdictione propositas habet praetor. veluti de
pecunia constituta, cui similis videbatur recepticia: sed ex
nostra constitutione, cum et si quid plenius habebat, hoc in
pecuniam constitutam transfusum est, ea quasi supervacua
iussa est cum sua auctoritate a nostris legibus recedere. item
praetor proposuit de peculio servorum filiorumque familias
et ex qua quaeritur, an actor iuraverit, et alias complures.
De pecunia autem constituta cum omnibus agitur, quicumque 9
vel pro se vel pro alio soluturos se constituerint, nulla scilicet
stipulatione interposita. nam alioquin si stipulanti pro-
miserint, iure civili tenentur. Actiones autem de peculio 10
ideo adversus patrem dominumve comparavit praetor, quia
licet ex contractu filiorum servorumve ipso iure non teneantur,
aequum tamen esset peculio tenus, quod veluti patrimonium
est filiorum filiarumque, item servorum, condemnari eos.
Item si quis postulante adversario iuraverit deberi sibi 11
pecuniam quam peteret, neque ei solvatur, iustissime accom-
modat ei talem actionem, per quam non illud quaeritur, an

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usually a customer—to a third person; the name being perhaps derived from the sense of recipere which Nonius Marcellus attributes to recipere—promittere, polliceri: cf. Asconius Pedianus: 'recipitur, id est promittitur, id est pro iudicato respondetur.' The advantages of recepticia over the actio de constituta pecunia had been that it applied to all kinds of property, while the latter lay only on promises relating to res fungibiles; that it admitted, while the latter did not, of condicio or dies, and was perpetual, while the latter was limited to an annus utilis, p. 429 supr. The reference is to Cod. 4. 18. 2. pr. and 1. For the actio de peculio see Tit. 7. 4 and notes inf.; for that 'ex qua quaeritur, an actor iuraverit' note on the next section.

§ **11.** The Romans regarded the oath as a mode of proving rights and duties, no less than facts, co-ordinate with judgment and confession; 'post rem iudicatam vel iureiurando decisam vel confessionem in iure factam nihil quaeritur' Dig. 42. 1. 56: cf. note on Tit. 13. 4 inf. As appears from the text, when a matter had once been sworn to by one of the parties, the other was estopped from disputing its truth otherwise than by denying that the oath had been taken at all; behind it the law could not go: 'non aliud quaeritur quam an iuratum sit' Dig. 12. 2. 5. 2. The mode in which the oath was used was by the plaintiff demanding of his adversary in the initial stage of the proceedings (in iure, in the formulary period) whether he would swear that the claim had no foundation; if he did so, he was protected by the exceptio iurisiurandi from further litigation: but if, without being prepared to go as far as this, he challenged the plaintiff to swear to the justice of his claim, and the latter did so,

12 ei pecunia debeatur, sed an iuraverit. Poenales quoque actiones bene multas ex sua iurisdictione introduxit: veluti adversus eum qui quid ex albo eius corrupisset: et in eum qui patronum vel parentem in ius vocasset, cum id non impetras-
Cf.G.iv.46. set: item adversus eum, qui vi exemerit eum qui in ius vocaretur, cuiusve dolo alius exemerit: et alias innume-
13 rabiles. Praeiudiciales actiones in rem esse videntur, quales sunt, per quas quaeritur, an aliquis liber vel an libertus sit, vel de partu agnoscendo. ex quibus fere una illa legitimam causam habet, per quam quaeritur, an aliquis liber sit: ceterae ex ipsius praetoris iurisdictione substantiam capiunt.

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he was debarred from denying his liability; if he refused to discharge it, he could be brought to bay by the actio in factum referred to in the text. It is generally thought that the oath could be used in this way in any action: but it seems more probable that its use was confined to condictio certae pecuniae and triticaria and the actiones operarum and pecuniae constitutae: see Girard, 4th ed. p. 999, note 1.

§ **12.** The praetor's edicts and orders seem, like the leges (Dion. Halic. R. A. 3. 36), to have been engraved on tablets of oak, which were then whitened over and exposed to public view. Subsequently other materials were used: 'in albo, vel in charta, vel in alia materia' Dig. 2. 1. 7. pr., but the name album was retained. Albi corruptio is used in a wide sense: 'is qui album raserit, corruperit, sustulerit, mutaverit, quidve aliud propositum edicendi causa turbaverit, extra ordinem punietur' Paul. Sent. Rec. 1. 13*a*. 3. For the action of a patron against his freedman for suing him without first obtaining the praetor's permission (Tit. 16. 3 inf.) see Gaius iv. 46, which also refers to the penal actio in factum 'contra eum qui vi exemerit eum qui in ius vocatur': for the latter cf. also Dig. 2. 7. Among the 'alias innumerabiles' are the actions mentioned in Tit. 5 supr., and § 25 inf.

§ **13.** For praejudicial actions under the system of formulae see Excursus X inf. Their object is merely to judicially ascertain facts which are of legal importance, or the existence of alleged legal relations, e.g. a man's status or paternity, the amount of a dos (Gaius iv. 44), whether a woman is married or not, Dig. 25. 3. 3. 4, whether the provisions of this or that enactment have been complied with (e.g. the lex Cicereia, Gaius iii. 123, p. 425 supr.), etc. Hence the name praeiudicia; the decision forms or may form the basis of subsequent litigation. As they do not result in condemnation, but merely in a pronunciatio, they are sometimes said to be iudicia, but not actiones (e.g. Dig. 3. 3. 35. 2); Justinian says of them 'in rem esse videntur' because the plaintiff 'cum eo agit qui nullo iure ei obligatus est, movet tamen alicui de aliqua re controversiam' § 1 supr.: cf. Gaius iv. 87; though in some passages (e.g. Dig. 44. 7. 37. pr.; 6. 1. 1. 2) they are opposed to vindicationes. The praeiudicium 'an aliquis liber sit' was older even than the Twelve Tables: 'ius quod ipse

Sic itaque discretis actionibus certum est non posse actorem 14 G. iv. 4.
rem suam ita ab aliquo petere ' si paret eum dare oportere ' : nec enim quod actoris est id ei dari oportet, quia scilicet dari cuiquam id intellegitur, quod ita datur, ut eius fiat, nec res quae iam actoris est magis eius fieri potest. plane odio furum, quo magis pluribus actionibus teneantur, effectum est, ut extra poenam dupli aut quadrupli rei recipiendae nomine fures etiam hac actione teneantur ' si paret eos dare oportere ', quamvis sit adversus eos etiam haec in rem actio, per quam rem suam quis esse petit. Appellamus autem in rem quidem 15 G. iv. 5.
actiones vindicationes: in personam vero actiones, quibus dare facere oportere intenditur, condictiones. condicere enim est denuntiare prisca lingua: nunc vero abusive dicimus condic- G. iv. 18.
tionem actionem in personam esse, qua actor intendit dari sibi oportere: nulla enim hoc tempore eo nomine denuntiatio fit.

Sequens illa divisio est, quod quaedam actiones rei per- 16 G. iv. 6.
sequendae gratia comparatae sunt, quaedam poenae persequendae, quaedam mixtae sunt. Rei persequendae causa com- 17
paratae sunt omnes in rem actiones. earum vero actionum, quae in personam sunt, hae quidem quae ex contractu nascuntur fere omnes rei persequendae causa comparatae vi- Cf. G. iv. 7.
dentur: veluti quibus mutuam pecuniam vel in stipulatum deductam petit actor, item commodati, depositi, mandati, pro

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[Appius Claudius] ex vetere iure in duodecim tabulas transtulerat ' Dig. 1. 2. 2. 24.

§ 14. Of course the expression ' si paret ', etc. has no formal or processual signification in Justinian: all that is meant is that a plaintiff cannot by a real action demand conveyance (datio) but merely recognition of his ownership or other ius in rem. For the anomaly of allowing a person whose property has been stolen the option between a real and a personal action see p. 522 supr. In this connection furtum includes not only rapina, but violent ouster from land: ' et ei, qui vi aliquem de fundo deiecit posse condici ' Dig. 13. 3. 2.

§ 15. For the origin and history of condictio see Excursus X inf. The grounds upon which it lay were the same in Justinian's time as in the formulary period; viz. mutuum, stipulation for money or other certae res, lex (§ 24 inf.), and enrichment of a defendent at the plaintiff's cost sine causa; but the penal sponsio tertiae partis in condictio certi had disappeared, as might be inferred from the description in § 17 inf. of the remedy on mutuum as merely rei persecutoria.

§ 17. Actions rei persequendae causa are defined as those ' quibus persequimur quod ex patrimonio abest ' Dig. 44. 7. 35: they are designed

socio, ex empto vendito, locato conducto. plane si depositi agetur eo nomine, quod tumultus incendii ruinae naufragii causa depositum sit, in duplum actionem praetor reddit, si modo cum ipso apud quem depositum sit aut cum herede eius ex dolo ipsius agitur: quo casu mixta est actio.

18 Ex maleficiis vero proditae actiones aliae tantum poenae persequendae causa comparatae sunt, aliae tam poenae quam rei persequendae et ob id mixtae sunt. G. iv. 8. **poenam tantum persequitur** quis **actione furti**: sive enim manifesti agatur quadrupli sive nec manifesti dupli, de sola poena agitur: nam ipsam rem propria actione persequitur quis, id est suam esse petens, sive fur ipse eam rem possideat, sive alius quilibet: eo amplius adversus furem etiam **condictio** est rei.

19 **Vi** autem **bonorum raptorum** actio mixta est, quia in quadruplo rei persecutio continetur, poena autem tripli est. G. iv. 9. sed et **legis Aquiliae** actio de **damno** mixta est, non solum si **adversus infitiantem in duplum agatur**, sed interdum et si in simplum quisque agit. veluti si quis hominem claudum aut luscum occiderit, qui in eo anno integer et magni pretii fuerit: tanti enim damnatur, quanti is homo in eo anno plurimi fuerit, secundum iam traditam divisionem. item mixta est actio contra eos, qui relicta sacrosanctis ecclesiis vel aliis venerabilibus locis legati vel fideicommissi nomine dare distulerint usque adeo, ut etiam in iudicium vocarentur: tunc etenim et ipsam rem vel pecuniam quae relicta est dare compelluntur et aliud tantum pro poena, et ideo in duplum eius fit condemnatio.

20 Quaedam actiones mixtam causam optinere videntur tam

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merely to redress and make reparation for the wrong by which they are called into operation. For depositum miserabile see p. 398 supr. The contractual actio redhibitoria (p. 436 supr.) was also sometimes penal, Dig. 21. 1. 45, and so too was the action quasi ex contractu spoken of in § 19 ad fin.

§ **18.** For the actio furti see p. 519 supr.

§ **19.** For the 'mixed' character of the actions on vi bona rapta and damnum iniuria datum cf. Tit. 2. pr., Tit. 3. 9 supr. and notes. The latter would be merely rei persecutoria if the defendant admitted his liability in the abstract (§ 26 inf.), the iudicium being solely for the purpose of assessing the damages, and if the value of the slave killed (e.g.) had not been higher in the preceding year than at the actual moment of his death. For legacies ad pias causas cf. Bk. iii. 27. 7 and § 26 inf.

§ **20.** The functions of the judge in the iudicia divisoria are more fully

in rem quam in personam. qualis est familiae erciscundae actio, quae competit coheredibus de dividenda hereditate: item communi dividundo, quae inter eos redditur, inter quos aliquid commune est, ut id dividatur: item finium regundorum, quae inter eos agitur qui confines agros habent. in quibus tribus iudiciis permittitur iudici rem alicui ex litigatoribus ex bono et aequo adiudicare et, si unius pars praegravari videbitur, eum invicem certa pecunia alteri condemnare.

Omnes autem actiones vel in simplum conceptae sunt vel **21**
in duplum vel in triplum vel in quadruplum: ulterius autem
nulla actio extenditur. In simplum agitur veluti ex stipula- **22**
tione, ex mutui datione, ex empto vendito, locato conducto,

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described in Tit. 17. 4–6 inf. The explanation of their being partly real, partly personal, must be sought in the structure of their formula in the earlier period. This seems to have contained two intentiones, the first in rem concepta, and followed by an adiudicatio (' quantum adiudicari ex aequo et bono oportet iudex Titio adiudicato ' Gaius iv. 42), the second concepta in personam, and followed by a condemnatio (e.g. tum quicquid ob eam rem alterutrum alteri dare facere oportet ex fide bona, eius iudex alterum alteri condemnato). Mutatis mutandis, the whole formula was repeated for each of the parties (e.g. each joint owner), whence Ulpian calls these actions mixtae in another sense: ' mixtae actiones, in quibus uterque actor est ' Dig. 44. 7. 37. 1. Under Justinian they are in reality in personam only, arising quasi ex contractu, Bk. iii. 27. 3 supr.: ' finium regundorum actio in personam est, licet pro vindicatione rei est ' Dig. 10. 1. 1.

The last named action, which was as old as the Twelve Tables, and had been regulated by the lex Mamilia and enactments of Constantine, Valentinian II and Theodosius I, was in Justinian's time limited to disputes as to the boundaries of praedia rustica, Dig. 10. 1. 4. 10; the judge was assisted by experts (agrimensores) as assessors, and neither party could plead usucapio unless it had extended to thirty years.

§ **21.** The expression in simplum, in duplum etc. concepta, which refers to the condemnatio, is another trace of the survival of the formula n the later procedure. Where a plaintiff sues for ' id quod sua interest ' the action is in simplum concepta, though the amount of this may far exceed the verum rei pretium, Dig. 19. 1. 13. pr. ' Ulterius (quam in quadruplum) nulla actio extenditur ' means no more than that in no action does the law direct the recovery of more than four times the penal unit; for sometimes the penalty will have no fixed relation to the value of the object, and so as a fact will be more than fourfold that value (e.g. Cod. 7. 10. 7), or there may be two condemnations arising ex eadem re, which added together exceed the quadruplum, e.g. Dig. 47. 9. 3. 8.

23 mandato et denique ex aliis compluribus causis. In duplum agimus veluti furti nec manifesti, damni iniuriae ex lege Aquilia, depositi ex quibusdam casibus: item servi corrupti, quae competit in eum, cuius hortatu consiliove servus alienus fugerit aut contumax adversus dominum factus est aut luxuriose vivere coeperit aut denique quolibet modo deterior factus sit (in qua actione etiam earum rerum, quas fugiendo servus abstulit, aestimatio deducitur): item ex legato, quod venerabilibus locis relictum est, secundum ea quae supra diximus.
24 Tripli vero, cum quidam maiorem verae aestimationis quantitatem in libello conventionis inseruit, ut ex hac causa viatores, id est exsecutores litium, ampliorem summam sportularum

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§ **23**. The action under the lex Aquilia is in duplum only adversus infitiantem, § 19 supr., and that on the deposit only under the circumstances referred to in § 17. The actio servi corrupti (for which cf. Tit. 1. 8 supr.) is said to be in duplum by the praetor in Dig. 11. 3. 1. pr.

§ **24**. The libellus conventionis was a petition or bill addressed to the judge, by which actions were commenced under the system of cognitio in vogue in Justinian's time; and this is the sole meaning in his compilations of in ius vocatio and actionis editio. It had to contain short particulars of the plaintiff's claim, so as to give the defendant a general idea of the nature of the demand made against him, and to show more specifically, (1) the character of the right affirmed, e.g. whether it was real or personal; if the former, whether dominium, servitus, pledge, etc.; if the latter, whether arising ex contractu or delicto, and what kind of contract or delict; (2) the thing or the wrongful act to which the action related. This statement of claim is what is now meant by intentio, e.g. in § 33 inf., cf. note on § 1 supr. It was necessary that it should be signed by the plaintiff, or by a notary on his behalf if he could not write; by this he definitely assumed the responsibility of the action, which, however, he more formally acknowledged by entering into a cautio, in one of the forms described in Tit. 11. 2 inf., which was enrolled in the acta, and by which he bound himself to bring the cause to trial within two months, or in default to pay the defendant double the costs which he had incurred, to push it through to judgment, and to pay the defendant's costs in the event of defeat. Unless the judge refused the action, the libellus was now registered in the acta, and the defendant was summoned (commonitio, citatio) by an officer of the court (executor, viator), a copy of the libellus being at the same time served upon him. In reply to this he had to deliver a signed and dated libellus contradictionis or responsionis, stating his defence, if any; to pay a fee (sportulae, referred to in this section) proportioned to the value of the matter in dispute, and to bind himself by a cautio, usually with sureties, to appear in court on the day fixed for trial, and 'in iudicio permanere usque ad terminum litis' Tit.

nomine exegerint: tunc enim quod propter eorum causam
damnum passus fuerit reus, id triplum ab actore consequetur,
ut in hoc triplo et simplum, in quo damnum passus est, con-
numeretur. quod nostra constitutio induxit, quae in nostro
codice fulget, ex qua dubio procul est ex lege condicticiam
emanare. Quadrupli veluti furti manifesti, item de eo, quod 25
metus causa factum sit, deque ea pecunia, quae in hoc data sit,
ut is cui datur calumniae causa negotium alicui faceret vel
non faceret: item ex lege condicticia a nostra constitutione
oritur, in quadruplum condemnationem imponens his exse-
cutoribus litium, qui contra nostrae constitutionis normam
a reis quicquam exegerint. Sed furti quidem nec manifesti 26
actio et servi corrupti a ceteris, de quibus simul locuti sumus,
eo differt, quod hae actiones omnimodo dupli sunt: at illae,
id est damni iniuriae ex lege Aquilia et interdum depositi,
infitiatione duplicantur, in confitentem autem in simplum
dantur: sed illa, quae de his competit, quae relicta venera-
bilibus locis sunt, non solum infitiatione duplicatur, sed et si
distulerit relicti solutionem, usque quo iussu magistratuum
nostrorum conveniatur, in confitentem vero et antequam iussu
magistratuum conveniatur solventem simpli redditur. Item 27
actio de eo, quod metus causa factum sit, a ceteris, de quibus

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11. 2. inf.; in default of this security he was liable to be placed under supervision, and even to be incarcerated, during the process. The day for trial was fixed by the plaintiff when he delivered his bill or libellus, but by an enactment of Justinian (Nov. 53. 3) the defendant was entitled to have an interval of at least twenty days.

For plus petitio by the plaintiff in his libellus conventionis see § 33 inf. The only other actions apparently which had been in triplum conceptae are those on furtum conceptum and oblatum, Gaius iii. 191, iv. 173, p. 515 supr. For statutory condictions see Dig. 13. 2. Justinian's enactment referred to is in Cod. 3. 10. 2. 2.

§ **25**. For the actio quod metus causa see § 27 and notes inf.; and for calumnia Tit. 16. 1 inf. The words 'negotium alicui faceret' are from the edict (Dig. 3. 6. 1. pr.); the jurists seem to have restricted the negotium to actual litigation or prosecution, Dig. ib. 1. 6. 8 and 9. Justinian's constitution is in Cod. 3. 2. 4.

§ **26**. See on Bk. iii. 27. 7 supr. The heir charged with legacies ad pias causas is penalized not only for infitiatio but for mora.

§ **27**. The Romans regarded dispositions made under the pressure of intimidation (as distinct from actual force) as really voluntary: 'coactus volui' Dig. 4. 2. 21. 5; and the civil law therefore upheld them. They

simul locuti sumus, eo differt, quod eius natura tacite continetur, ut, qui iudicis iussu ipsam rem actori restituat, absolvatur. quod in ceteris casibus non ita est, sed omnimodo quisque in quadruplum condemnatur, quod est et in furti manifesti actione.

G.iv.62. 28 Actionum autem quaedam bonae fidei sunt, quaedam stricti iuris. **bonae fidei sunt hae: ex empto vendito, locato conducto, negotiorum gestorum, mandati, depositi, pro socio,**

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first became impeachable by the introduction of the praetorian actio quod metus causa, to support which, however, it was as a rule required that the threat should have been directed against the life, limb, or liberty of the plaintiff or some near relative, Dig. ib. 2; ib. 3. 1; ib. 4–6; ib. 7. 1; ib. 8, and could have been carried out by the other. It was said to be in rem scripta, Dig. ib. 9. 8; i.e. it could be brought against any one who had profited by the intimidation: 'nec cuiquam iniquum videtur ex alieno facto alium in quadruplum condemnari, quia non statim quadrupli est actio, sed si res non restituatur' Dig. ib. 14. 3. The penal action in quadruplum was prescribed in an annus utilis; it possessed all the characteristics of penal actions in general: e.g. it was noxal, and it lay against the delinquent's heir only so far as he had been enriched by the offence, Dig. 4. 2. 16. 2; after the year it was merely rei persecutoria, and was granted only causa cognita, after a preliminary investigation, Dig. ib. 14. 1. The plaintiff had other remedies in the exceptio metus, Tit. 13. 9 inf.: in integrum restitutio, § 33 inf., and in the ordinary actions on many contracts.

§ 28. The origin of the distinction between actions stricti iuris and bonae fidei is described in Excursus X inf. The broad general divergence between them is well put by Cicero, pro Rosc. 4 'quid est in iudicio? directum, asperum, simplex: si paret . . . dari oportere. Quid est in arbitrio? mite, moderatum, quantum aequius melius, id dari.' But the expression actio stricti *iuris*, which does not occur elsewhere in the Corpus iuris, is unhappy, as tending to obscure the real character of the distinction; the ius is just as strictum in a bonae fidei action; what *is* strictum is the iudicium (§ 30 inf.). The principal specific points of difference are as follow:

(1) Where the action is stricti iuris, the judge is bound by the strict and literal words of the disposition; where it is bonae fidei he may go behind them to discover the real intention of the parties. Hence, in the latter case, he may take cognizance of pacta adiecta, formless subsidiary conventions of the parties, if substantially a part of the disposition upon which the action is brought, Dig. 2. 14. 7. 5. In stricti iuris iudicia this was not possible under the older law, Dig. ib. 7, though later some exceptions were recognized, Dig. 12. 1. 40, and by the insertion of the clausula doli (Dig. 45. 1. 121; 50. 16. 69) in the contract upon which the action was brought the judge would be enabled to deal with the case much as if

tutelae, commodati, pigneraticia, familiae erciscundae, communi dividundo, praescriptis verbis quae de aestimato proponitur, et ea, quae ex permutatione competit, et hereditatis petitio. quamvis enim usque adhuc incertum erat, sive inter bonae fidei iudicia connumeranda sit sive non, nostra tamen

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the action had been bonae fidei. So too in a bonae fidei action the judge may rule local or other usages to be implied terms in a contract, Dig. 21. 1. 31. 20; 3. 5. 7.

(2) A bonae fidei action lies on grounds on which one stricti iuris would not, e.g. dolus and metus: i.e. a party who has been induced by fraud or intimidation to make a disposition may impeach its validity by the ordinary action thereon, if that action is of the former, but not if it is of the latter character.

(3) Where a defendant is liable for 'omnis causa', the value of the latter is in a bonae fidei action ascertained as from the date of mora; in one which is stricti iuris (except possibly where it is condictio incerti) only from litis contestatio, Dig. 22. 1. 38. 7 and 8.

(4) Under the formulary procedure the judge who tried a stricti iuris action could listen to no exceptio which had not been expressly set forth in the formula; in bonae fidei actions no defences which could be included under the very comprehensive idea of dolus need be advanced so early in the proceedings; see Excursus X inf. But under Justinian the maxim 'doli exceptio bonae fidei iudiciis inest' (which occurs in Dig. 24. 3. 21; 30. 84. 5) has no processual significance: the stage at which such defences had to be advanced is determined by other considerations, as is shown on Tit. 13. pr. inf.

(5) In stricti iuris actions iusiurandum or iuramentum in litem was, as a rule, inadmissible, but was regularly applied in such actions bonae fidei as demanded restitution or production of property if the defendant refused or through his own fault was unable to produce or restore.

(6) In stricti iuris actions the damages were assessed (litis aestimatio) as at the moment of litis contestatio; in bonae fidei actions at condemnatio, Dig. 13. 6. 3. 2.

(7) If a place was fixed for the performance of a contract the remedy upon which was stricti iuris, it could originally be brought at that place only; a bonae fidei action under similar circumstances lay at any place where the defendant was amenable to the jurisdiction; see on Bk. iii. 15. 5 supr.

To Justinian's list of bonae fidei actions must be added (for the older law) the actio fiduciae (Gaius iv. 62); and the action on innominate contracts generally, not merely on aestimatum and permutatio, was of this character. It seems that Justinian's only reason for classing hereditatis petitio among these actions is that the defendant was not required to insert an exceptio doli in order to recover compensation for any outlay he might have made on the property: Cod. 3. 31. 12. 3.

The SC. Iuventianum passed under Hadrian first gave hereditatis

29 constitutio aperte eam esse bonae fidei disposuit. Fuerat
G. iv. 62. antea et **rei uxoriae** actio ex bonae fidei iudiciis: sed cum
pleniorem esse ex stipulatu actionem invenientes omne ius,
quod res uxoria ante habebat, cum multis divisionibus in ex
stipulatu actionem, quae de dotibus exigendis proponitur,
transtulimus, merito rei uxoriae actione sublata ex stipulatu,
quae pro ea introducta est, naturam bonae fidei iudicii tantum
in exactione dotis meruit, ut bonae fidei sit. sed et tacitam
ei dedimus hypothecam: praeferri autem aliis creditoribus in
hypothecis tunc censuimus, cum ipsa mulier de dote sua ex-
30 periatur, cuius solius providentia hoc induximus. In bonae
fidei autem iudiciis libera potestas permitti videtur iudici ex

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petitio a mixed character (Dig. 5. 3. 20. 6) by enabling the heir to recover from other persons all advantage which they had derived from res hereditariae which they no longer possessed (e. g. which they had sold); they came, in fact, to be regarded somewhat in the light of the heir's negotiorum gestores and, therefore, were bound as such to surrender to him all profit which they had made by interfering in business which was not their own. It would seem that, in prosecuting such claims, the action, being in effect in personam, was conducted on bonae fidei principles, so that the question arose, which Justinian determined by Cod. 3. 31. 12. 3, whether it was not itself bonae fidei.

§ **29**. The actio rei uxoriae (for the scope of which see p. 132 supr.) is not so often said to be bonae fidei as to belong to a cognate class of actions 'in bonum et aequum conceptae' Dig. 4. 5. 8; 24. 3. 66. 7, among which were also the actio iniuriarum aestimatoria, Dig. 47. 10. 11. 1; the actio de effusis, Dig. 9. 3. 1. pr., and the aedilician action mentioned in Tit. 9. 1 inf.; in these the discretion of the judge was freer even than in bonae fidei actions proper. By substituting the actio ex stipulatu de dotibus exigendis (which naturally was stricti iuris) for the actio rei uxoriae Justinian fictitiously represented the restoration of the dos as having been promised by stipulation with a clausula doli, whereby it acquired the bonae fidei character which he here expressly gives it. The superiority of the actio ex stipulatu had consisted in its being transmissible to heirs and in some other points noticed in Cod. 5. 13. 1. 3–10. For the wife's right of hypotheca see p. 132 supr.

§ **30**. 'Compensatio (set-off) est debiti et crediti inter se contributio', Dig. 16. 2. 1. The full application of the principle was only of slow development in Roman law. Gaius tells us (iv. 64) that bankers in suing their debtors were compelled to make allowance for what they themselves owed the latter, and to bring their action only for the balance; and that the actions of bonorum emptores (p. 389 supr.) against debtors of the purchased bankrupt estate were governed by the same rule, though the 'deductio' in the latter case had a wider operation than the 'compensatio' in the former (ib. 65–68). In bonae fidei iudicia the judge was

bono et aequo aestimandi, quantum actori restitui debeat. in quo et illud **continetur, ut,** si quid **invicem actorem praestare oporteat,** eo compensato **in reliquum is cum quo actum est condemnari debeat.** sed et in strictis iudiciis ex rescripto divi Marci opposita doli mali exceptione compensatio inducebatur. sed nostra constitutio eas compensationes, quae iure aperto G. iv. 61.

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bound, as acting ex fide bona, to take account of sets-off claimed by the defendant arising ex eadem causa, from the same transaction (ib. 61); and though Justinian says here that set-off was not allowed in stricti iuris actions till the rescript of M. Aurelius, and then only on the condition of the defendant's getting an exceptio doli inserted in the formula, it would seem that this had been done before in some actions of this class by special favour (Dig. 16. 2. 4 and 5), and that the emperor's enactment only made the matter a general rule. According to Girard (4th ed. p. 705) the plaintiff was compelled to allow for the defendant's set-off in making his claim, and to demand only the difference between the two sums: for if he claimed the whole sum due, and the exceptio doli was inserted in the formula and proved, the judge could not condemn the defendant to pay merely the difference: he was bound to absolve him altogether. As actions stricti iuris always lay only on transactions generating unilateral obligation, it is obvious that here the set-off must arise ex dispari causa, and consequently similar sets-off were now allowed in bonae fidei actions if advanced in the form of the same exceptio. The distinction between compensatio effected officio iudicis, and that resulting from the use of the exceptio seems (though the point is much disputed) to have lasted on in the new process after the disappearance of the formula, until it was abolished by Justinian's enactment here referred to (Cod. 4. 31. 14. pr. and 1), so that in his time set-off of any kind, whether arising ex eadem or ex dispari causa, could be advanced with effect at any stage of the action up to judgment, and consequently the words 'ex eadem causa' in § 34 inf. are held to have been imported into the Institutes from Gaius iv. 61 by an oversight. Whether by this enactment Justinian first allowed compensatio in real actions ('sive in rem sive in personam') is also uncertain; traces of its earlier application in such cases are found by some writers in Dig. 5. 2. 21. 2; 5. 3. 31. 2; 6. 1. 48: cf. the cases in Bk. ii. Tit. 1. 30. 32-34 supr.

It was essential that the claims set off against one another should relate to par materia or genus: 'in compensationem hoc solum vocatur, quod eiusdem generis et naturae est, veluti pecunia cum pecunia compensatur, triticum cum tritico, vinum cum vino' Gaius iv. 66, '. . . . si constat, pecuniam invicem deberi' Cod. 4. 31. 4; but it is hardly certain how far it was required that the set-off should be liquidated, i. e. clearly proved or proveable. The chief authority on this point is Cod. 4. 31. 14. 1 'ita tamen compensationes obici iubemus, si causa, ex qua compensetur, liquida sit, et non multis ambagibus innodata, sed possit iudici facilem exitum sui praestare. Satis enim miserabile est, post multa forte vanaque certamina, cum res iam fuerit approbata, tunc ex altera parte quae iam

nituntur, latius introduxit, ut actiones ipso iure minuant sive in rem sive personales sive alias quascumque, excepta sola depositi actione, cui aliquid compensationis nomine opponi satis impium esse credidimus, ne sub praetextu compensa-
31 tionis depositarum rerum quis exactione defraudetur. Praeterea quasdam actiones arbitrarias id est ex arbitrio iudicis

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paene convicta est, opponi compensationem iam certo et indubitato debito, et moratoriis ambagibus spem condemnationis excludi.' Though the expression 'aperto iure' in the text above might seem to imply that the counter claim must have been proved and established in an independent action, it seems better to understand this passage to mean that the proof and aestimatio of the counter claim must not be so intricate as practically to reverse the respective *rôles* of the parties, and as it were to turn the defendant into a plaintiff.

Great difficulty is occasioned by the expression 'actiones ipso iure minuant' in the text, and by the attribution even in juristic writings (e.g. Dig. 16. 2. 4; ib. 10. pr.; ib. 21) to compensatio of an operation 'ipso iure'. The standing opposition, in modes by which obligations were invalidated, between invalidation ipso iure and invalidation ope exceptionis (p. 462 supr.) has led some commentators to interpret these passages by representing set-off as by itself (or 'sine facto hominis') absolutely extinguishing the plaintiff's claim, so far as it goes; but if this were so, such a tacit or automatic reduction of that claim would take place in all cases where the defendant had a set-off, whether the latter wished it or not; a hypothesis which is sufficiently disproved by Dig. 27. 4. 1. 4 'praeterea si tutelae iudicio quis convenietur, reputare potest id, quod in rem pupilli impendit, sic erit arbitrii eius, utrum compensare, an petere velit sumtus', and Dig. 16. 2. 7. 1 'si rationem compensationis iudex non habuerit, salva manet petitio', cf. ib. 5. The real meaning of the expression seems to be that, though the defendant, if he wishes to set-off against the plaintiff, must plead his claim, yet, immediately he has pleaded and proved it, its operation relates back to the moment at which the two claims first coexisted: 'si constat, pecuniam invicem deberi, ipso iure pro soluto compensationem haberi oportet ex eo tempore, ex quo ab utraque debetur, utique quoad concurrentes quantitates, eiusque solius, quod amplius apud alterum est, usurae debentur, si modo earum petitio subsistit' Cod. 4. 31. 4; from that moment no interest can be claimed, except on the balance, Cod. ib., Dig. 16. 2. 11; and if the defendant forgets to set-off, he can recover what he has paid in excess by condictio indebiti, Dig. ib. 10. 1; 12. 6. 30. So far in fact as the two debts coextended, each was extinguished: 'dedisse intellegendus est etiam is, qui compensavit' Dig. 50. 16. 76.

§ 31. For the origin and nature of actiones arbitrariae in the formulary period see Excursus X inf. Under Justinian they may best be described as actions in which delivery or production of specific property, and possibly specific performance of an agreement, would be decreed, the

pendentes appellamus, in quibus nisi arbitrio iudicis is cum quo agitur actori satisfaciat, veluti rem restituat vel exhibeat vel solvat vel ex noxali causa servum dedat, condemnari debeat. sed istae actiones tam in rem quam in personam inveniuntur. in rem veluti Publiciana, Serviana de rebus coloni, quasi Serviana, quae etiam hypothecaria vocatur: in personam veluti quibus de eo agitur, quod aut metus causa aut dolo malo factum est, item qua id, quod certo loco promissum est, petitur. ad exhibendum quoque actio ex arbitrio iudicis pendet. in his enim actionibus et ceteris similibus permittitur iudici ex

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defendant being condemned in full damages only where execution of this decree was impossible. Where the object of the action was restitution, it was enforced by the strong arm of the law; 'qui restituere iussus iudici non paret, contendens non posse se restituere, si quidem habeat rem, manu militari officio iudicis ab eo possessio transfertur, et fructuum duntaxat omnisque causae nomine condemnatio fit: si vero non potest restituere, si quidem dolo fecit, quominus possit, is quantum adversarius in litem sine ulla taxatione in infinitum iuraverit, damnandus est: si vero nec potest restituere, nec dolo fecit quominus possit, non pluris, quam quanti res est, id est, quanti adversarii interfuit, condemnandus est. Haec sententia generalis est, et ad omnia, sive interdicta, sive actiones, et sive in rem sive in personam sint, ex quibus ex arbitratu iudicis quid restituitur, locum habet' Dig. 6. 1. 68. It is not improbable indeed that this direct intervention of the state to compel performance of the act demanded occurred whenever such performance was possible (e. g. 'exhibere cogendus est' Dig. 10. 4. 8). Interdicts which were restitutoria and exhibitoria, and the actions depositi, commodati, locati, and rei uxoriae, when their object was restitution, belonged to this class of remedy, besides the instances given in the text; their leading characteristic (apart from the decree of specific restitution, production, or performance) being that, if the defendant is unable through his own fault to do what is demanded of him, the damages to be paid are fixed by the plaintiff on oath (iusiurandum in litem).

Justinian's mention of actions demanding payment of money (solutio) as arbitrariae seems to relate only to the actio de eo quod certo loco, etc., for which see on Bk. iii. 15. 5. supr. For noxal actions see Tit. 8 inf.

The actio ad exhibendum (for which cf. Tit. 17. 3 inf.) was a civil action of a preliminary nature, enabling a plaintiff who could not pursue his right without the production of an object to enforce such production upon any one who was able to make it: 'exhibere est facere in publico potestatem, ut ei, qui agat, experiundi sit copia' Dig. 10. 4. 2, 'sciendum est adversus possessorem hac actione agendum non solum eum, qui civiliter, sed et eum, qui naturaliter incumbat possessioni' ib. 3. 15. It also lay against any one who by his own dolus had disabled himself from producing the object, Dig. ib. 15. The right to which the action was subsidiary might be in

bono et aequo secundum cuiusque rei de qua actum est naturam aestimare, quemadmodum actori satisfieri oporteat.

G.iv.52. 32 Curare autem debet **iudex**, ut omnimodo, quantum possibile ei sit, **certae pecuniae** vel rei sententiam ferat, etiam si de incerta quantitate apud eum actum est.

G.iv.53. 33 **Si quis** agens **in intentione** sua **plus complexus fuerit**, quam ad eum pertinet, **causa** cadebat, **id est rem** amittebat, nec facile in integrum **a praetore** restituebatur, nisi minor erat viginti quinque annis. huic enim sicut in aliis causis causa

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personam, as where a plaintiff wishes to bring a noxal action, but is not sure of the precise slave who committed the offence, Dig. ib. 3. 7; but usually it was in rem: e. g. a legatee has a choice from several similar objects, which he wants to see before he can choose, Dig. ib. 3. 6; the plaintiff's property is on the land of another who will not allow him to enter and take it away, ib. 5. 4; or it is connected or mixed with a res aliena, and must be separated before he can bring his real action, ib. 6 and 7: see note on p. 522 supr.

§ 32. In the formulary period the iudex had no power to condemn the defendant except to a money payment (Gaius iv. 48) even in the actiones arbitrariae; the only case in which he could award property was that of the iudicia divisoria. When formulae disappeared, the rule of the cognitio extraordinaria was adopted (hence certae *rei* in the text) and the iudex was enabled to decree a dare (transfer of ownership), a tradere (of possession), a restituere or an exhibere: 'miramur quare iudex, qui praepositus est in praedicta causa, non omnimodo condemnationem in servum, sed in aestimationem eius fecerit' Cod. 7. 4. 17. 1. The iudex was also as a rule bound under Justinian to condemn the losing party to pay his adversary's costs, Tit. 16. 1 inf.

The words in the text (quantum possibile ei sit) are intended to except those cases in which an independent arbitrium de aestimando, or inquiry to assess the damages, was thought necessary in order not to postpone delivery of judgment in the main action, Cod. 7. 46. 2, Dig. 6. 1. 76. 1; here there might be a condemnation, but the damages which the defendant had to pay would be ascertained by subsequent aestimatio.

§ 33. Under the system of formulae an overclaim (plus petitio) might be made in either the intentio, the condemnatio, or the demonstratio. It could occur in the intentio only where it was certa (e. g. si paret . . . quinquaginta aureos dare oportere, when the defendant really owed a less sum); and here its result was that the judge, finding the precise sum claimed was not in fact owed, was bound to absolve the defendant, and the plaintiff's right of action was thereby irrevocably gone, because the res had been in iudicium deducta, and either he could not sue again at all, or, if he could, the defendant could repel him by the exceptio rei iudicatae or in iudicium deductae, Gaius iv. 106: cf. Cic. de Invent. 2. 19 'ita ius civile habemus constitutum, ut causa cadat is, qui non, quemadmodum

cognita succurrebatur, si lapsus iuventute fuerat, ita et in hac causa succurri solitum erat. sane si tam magna causa iusti erroris interveniebat, ut etiam constantissimus quisque labi posset, etiam maiori viginti quinque annis succurrebatur: veluti si quis totum legatum petierit, post deinde prolati fuerint codicilli, quibus aut pars legati adempta sit aut quibusdam aliis legata data sint, quae efficiebant, ut plus petisse videretur petitor quam dodrantem, atque ideo lege Falcidia legata minuebantur. **Plus autem quattuor modis** G. iv. 53a. **petitur: re, tempore, loco, causa. Re: veluti si quis pro**

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oportet, egerit': cf. Tit. 13. 10 inf. If there was plus petitio in the condemnatio (e. g. si paret decem dare oportere, iudex viginti condemnato) nobody could suffer but the defendant, who should have taken care that the sum specified in the later did not exceed that in the earlier part of the formula; but he could get himself in integrum restitutus and the formula rectified by the praetor at any time before judgment, Gaius iv. 57. Overclaim in the demonstratio injured no one ('et hoc est quod dicitur, falsa demonstratione rem non perimi' Gaius iv. 58); the mistake could be corrected by the iudex without the necessity of any application to the praetor. Even after the disappearance of formulae a plaintiff who made an overclaim was punished with absolute loss of action on the ground of calumnia, but this was remedied by the constitution of Zeno referred to in the text, by which it was provided that, though, if the plaintiff brought his action prematurely (plus petitio tempore), he should pay the defendant's costs hitherto incurred and the latter be absolved, he might sue again, but not until twice the interval had elapsed for which he would properly have had to wait (Tit. 13. 10 inf.), and during that interval should have no claim to interest, Cod. 3. 10. 1. Justinian further enacted that in plus petitio re the judge should condemn the defendant, so far as he found him liable, and the plaintiff in three times the excess of fees exacted from the other by the 'viator' through the overclaim (§ 24 supr.). Plus petitio loco could no longer prejudice the defendant, because the judge was bound to apply the principles of the actio de eo quod certo loco, and either condemn the defendant to discharge his obligation at the place agreed upon, or make allowance for the loss and inconvenience he suffered by having to pay elsewhere; and plus petitio causa was equally harmless.

In integrum restitutio, to which there is a reference early in this section, was an equitable remedy introduced by the praetor through the edict, which in the formulary period had been perhaps the most striking example of his extraordinaria cognitio. Its function had been the rescission, in this or that concrete case, of rights and duties resulting from the operation of the ordinary law, because under the special circumstances equity so required, exactly as equity in England gave relief, for instance, against mistake, when law afforded no remedy whatever. And this rescission

decem aureis qui ei debebantur viginti petierit, aut si is, cuius ex parte res est, totam eam vel maiore ex parte suam
G. iv. 53b. **esse intenderit. Tempore : veluti si quis ante diem** vel ante condicionem **petierit.** qua ratione enim qui tardius solvit, quam solvere deberet, minus solvere intellegitur, eadem ratione
G. iv. 53c. qui praemature petit plus petere videtur. **Loco plus petitur, veluti** cum quis id, **quod certo loco** sibi stipulatus est, **alio loco petit sine commemoratione illius loci,** in quo sibi dari stipulatus fuerit : verbi gratia si is, qui **ita stipulatus fuerit 'Ephesi dare spondes ?' Romae pure intendat dari sibi oportere.** ideo autem plus petere intellegitur, quia utilitatem, quam habuit promissor, si Ephesi solveret, adimit ei pura intentione : propter quam causam alio loco petenti arbitraria actio proponitur, in qua scilicet ratio habetur utilitatis, quae promissori competitura fuisset, si illo loco solveret. quae utilitas plerumque in mercibus maxima invenitur, veluti vino oleo frumento, quae per singulas regiones diversa habent pretia : sed et pecuniae numeratae non in omnibus regionibus sub isdem usuris fenerantur. si quis tamen Ephesi petat, id est eo loco petat, quo ut sibi detur stipulatus est, pura actione recte agit : idque etiam praetor monstrat, scilicet quia utilitas

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was effected by the direct and immediate action of the magistrate; it was an exercise of his imperium, not of his iurisdictio : in integrum restitutio in its proper sense being thus distinguished from analogous cases in which a restoration occurred either ipso iure (as in postliminium) or by the remedial process of the ordinary law.

The conditions under which in integrum restitutio could be applied for are as follow :

(1) The applicant must have suffered a prejudice (laesio) from the operation of law, which may be lucrum cessans no less than damnum incidens, Dig. 4. 4. 7. 6 ; 4. 6. 27, but which need not be strictly proprietary, Dig. 4. 4. 3. 6 ; for examples see notes on §§ 4 and 5 supr.; Bk. ii. 15. 5 supr., Gaius iv. 57. On the principle 'de minimis non curat lex' it seems also to have been requisite that the laesio should not be merely trivial.

(2) The mere existence of a laesio in itself is insufficient ; there must also be a ground (iusta causa) upon which the application is based. These are six in number : 'integri restitutionem praetor tribuit ex his causis quae per metum, dolum, et status permutationem, et iustum errorem, et absentiam necessariam, et infirmitatem aetatis gesta esse dicuntur' Paul. Sent. Rec. 1. 7. 2 ; cf. Dig. 4. 1. 1.

The restitutio of a minor (i. e. person under twenty-five years of age)

solvendi salva est promissori. Huic autem, qui loco plus petere intellegitur, proximus est is qui **causa plus petit** : ut G. iv. 53d. ecce **si quis ita a te stipulatus** sit '**hominem Stichum aut decem aureos dare spondes?' deinde alterutrum petat**, veluti hominem tantum aut decem tantum. ideo autem plus petere intellegitur, quia in eo genere stipulationis promissoris est electio, utrum pecuniam an hominem solvere malit: qui igitur pecuniam tantum vel hominem tantum sibi dari oportere intendit, eripit electionem adversario et eo modo suam quidem meliorem condicionem facit, adversarii vero sui deteriorem. qua de causa talis in ea re prodita est actio, ut quis intendat

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was independent, if he were also impubes, of his guardian's auctoritas having been given to the disposition against which he appealed, Cod. 2. 25. 2. 3 and 5; 2. 27. 4 and 5, except where it was payment to him of a debt, Dig. 4. 4. 7. 2; and under exceptional circumstances he could not obtain restitutio at all, e. g. where he had represented himself as of full age, Cod. 2. 43. 2; where the person against whom he claimed it was also a minor, Dig. 4. 4. 11. 6; and where he had contracted a money loan at his father's order, Dig. ib. 3. 4.

Upon any of the remaining five causae a person of full age could get himself restitutus no less than a minor.

In integrum restitutio was not the only form of relief obtainable where one had been induced to make a disposition by intimidation or fraud. Dolus had always been a sufficient defence in a bonae fidei action, and it was made pleadable (in the form of an exceptio) to actions stricti iuris probably shortly after the time of Gallus Aquilius, who introduced the actio doli B. C. 65. In B. C. 78 a praetor named Octavius introduced the actio and exceptio quod metus causa. Whether in integrum restitutio propter dolum and metum was older than these remedies, and was to a great extent superseded by them, as Savigny contends, is uncertain; at any rate it seems clear from Cic. de Off. 3. 14 that restitutio doli causa was unknown before the time of Gallus Aquilius. It is, however, certain that their concurrent existence narrowed the operation of the equitable relief on these two causae: see Girard, 4th ed. p. 416, note 1.

An instance of restitutio propter errorem is supplied in the text above; the other cases of its application suggest the conclusion that it was almost entirely confined to laesiones incurred in the progress of an action, though examples of its occurrence in substantive law are found in Dig. 42. 6. 1. 17; 34. 9. 17.

Restitutio propter capitis deminutionem occurred only where the capitis deminutio was minima: 'pertinet hoc edictum ad eas capitis deminutiones, quae salva civitate contingunt; ceterum sive amissione civitatis, sive libertatis amissione contingat capitis deminutio, cessabit edictum' Dig. 4. 5. 2. pr. For its application see Bk. iii. 10. 3 and notes supr.

hominem Stichum aut aureos decem sibi dari oportere, id est ut eodem modo peteret, quo stipulatus est. praeterea **si quis generaliter hominem stipulatus sit** et specialiter **Stichum petat,** aut generaliter vinum stipulatus specialiter Campanum petat, aut **generaliter purpuram stipulatus sit, deinde specialiter Tyriam petat :** plus petere intellegitur, quia electionem adversario tollit, cui stipulationis iure liberum fuit aliud solvere, quam quod peteretur. quin etiam licet vilissimum sit quod quis petat, nihilo minus plus petere intellegitur, quia saepe accidit, ut promissori **facilius** sit illud solvere, **quod** maioris pretii est. Sed haec quidem antea in usu fuerant: postea autem lex Zenoniana et nostra rem coartavit. et si quidem tempore plus fuerit petitum, quid statui oportet, Zenonis divae memoriae loquitur constitutio : sin autem quantitate vel alio modo plus fuerit petitum, omne, si quid forte damnum ex

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Persons who, while absent either rei publicae causa, or by reason of justifiable fear, or in captivity with a public enemy, lost rights of property or of action could obtain restitution ; and persons at home could get themselves restituti against others who had obtained a proprietary advantage (e. g. by usucapio, § 5 supr.) or release from an action while abroad or imprisoned.

The edict upon this subject terminated with the so-called generalis clausula : 'item si qua alia causa videbitur, in integrum restituam' Dig. 4. 6. 1. 1 ; ib. 26. 9 ; words apparently intended to include all cases, other than those already specified, in which the realization of a right was prevented by obstacles of fact rather than of law.

(3) As a general rule, the case must be one in which the ordinary law affords no relief : 'in causae cognitione etiam hoc versabitur, num forte alia actio possit competere citra in integrum restitutio ; nam si communi auxilio et mero iure munitus sit, non debet ei tribui extraordinarium auxilium' Dig. 4. 4. 16. pr. But occasionally restitutio was merely an alternative, e. g. to the actio doli, quod metus causa, tutelae (Dig. 4. 4. 47. 1), and the bonae fidei actions, Cod. 2. 54. 3 ; 4. 44. 5 ; ib. 10. There are also a number of other exceptions to its general application ; e. g. no one could claim restitutio against penal laws, against a patron or ascendant, or against his own dolus.

(4) Restitutio must be applied for within a period of limitation fixed originally at an annus utilis, and extended by Justinian to a quadriennium continuum (note on § 5 supr.). It is disputed from what moment the period of limitation began to run ; according to some this is (except in absentia and minor aetas) the date of laesio ; according to others, the termination of the causa.

The procedure in the formulary period was extra ordinem. The restitutio

hac causa acciderit ei, contra quem plus petitum fuerit, commissa tripli condemnatione, sicut supra diximus, puniatur.
34 Si minus in intentione complexus fuerit actor, quam ad eum pertineret, veluti si, cum ei decem deberentur, quinque sibi dari oportere intenderit, aut cum totus fundus eius esset, partem dimidiam suam esse petierit, sine periculo agit: in reliquum enim nihilo minus iudex adversarium in eodem iudicio condemnat ex constitutione divae memoriae Zenonis. Cf. G.iv.56.
35 **Si quis aliud pro alio intenderit, nihil eum periclitari** placet, sed in eodem iudicio cognita veritate errorem suum corrigere ei permittimus, **veluti si is, qui hominem Stichum petere deberet, Erotem petierit, aut si quis ex testamento sibi dari oportere intenderit,** quod **ex stipulatu debetur.** G.iv.55.

36 Sunt praeterea quaedam actiones, quibus non solidum quod debetur nobis persequimur, sed modo solidum consequimur, modo minus. ut ecce si in peculium filii servive agamus: nam si non minus in peculio sit, quam persequimur, in solidum pater dominusve condemnatur: si vero minus inveniatur, eatenus condemnat iudex, quatenus in peculio sit. quemadmodum autem peculium intellegi debeat, suo ordine proponemus.
37 Item si de dote iudicio mulier agat, placet eatenus maritum condemnari debere, quatenus facere possit, id est quatenus

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was granted only after a careful inquiry by the praetor, in which both laesio and iusta causa had to be proved by the applicant; under Justinian the process was that of an ordinary action, the difference in the remedy being no longer formal, but material only.

§ 34. In minus petitio, under the formulary system, the plaintiff could sue for the residue in a subsequent action, though, if he attempted to do this in the same year of praetorship, he would be defeated by the exceptio litis dividuae, Gaius iv. 56, 112. Similarly, if, having several actions against the same defendant, he brought one or some before one iudex, but postponed the rest merely to annoy his opponent, he could within the same praetorship be met by the exceptio litis residuae, Gaius loc. cit. Zeno's enactment, which enabled the plaintiff to rectify his error in the course of his original action, is in Cod. 3. 10. 1. 3.

§ 35. Though the rule had been practically the same under the older system, it was necessary then to commence a fresh action with a corrected formula, Gaius iv. 55: 'primo vinculo tenentur, et mutare illis formulam non licet' Seneca, Ep. 117. 4.

§ 36. For the actio de peculio see Tit. 7. 4 and notes inf.

§ 37. In the cases mentioned in this and the two next sections the defendant was said to have a beneficium competentiae, which was pleaded

facultates eius patiuntur. itaque si dotis quantitati concurrant facultates eius, in solidum damnatur: si minus, in tantum quantum facere potest. propter retentionem quoque dotis repetitio minuitur: nam ob impensas in res dotales factas marito retentio concessa est, quia ipso iure necessariis sumptibus dos minuitur, sicut ex latioribus digestorum libris
38 cognoscere liceat. Sed et si quis cum parente suo patronove agat, item si socius cum socio iudicio societatis agat, non plus actor consequitur, quam adversarius eius facere potest. idem

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in defence as an exceptio, the creditor being bound to spare him enough of his property to live on, except in actions based on delict and fraud: 'in condemnatione personarum, quae in id quod facere possunt damnantur, non totum quod habent extorquendum est, sed et ipsorum ratio habenda est, ne egeant' Dig. 50. 17. 173; cf. Dig. 42. 1. 19. 1. This privilege was accorded by the law on three grounds. On account of the peculiar personal relation between the parties it belonged to husband and wife against one another, to parents against children, patrons against freedmen (§ 38 inf.), and to the father-in-law if sued by the husband for a promised dos durante matrimonio. By reason of the nature of the obligation upon which the action was based it was possessed by the husband and his representatives when sued for the recovery of a dos, by socii inter se, and by the promisor of a gift (§ 38 inf.). On account of the personal position of the debtor it belonged to the insolvent who had made a cessio bonorum (§ 40 inf.), to soldiers against all creditors whatsoever, and to children who had been recently released from patria potestas in respect of debts contracted while alieni iuris, unless by the father's death they had come into substantial property. Finally, the beneficium might be acquired by contract, Dig. 2. 14. 49.

When sued for the recovery of the dos at the termination of the marriage by the wife, her heirs, or the paternal ascendant who had given it, or during the marriage on account of mismanagement or insolvency, the husband or his heirs or representatives could deduct impensae necessariae, by the sum of which the value of the dos was held to have tacitly (ipso iure) diminished. For impensae utiles as distinct from necessariae the husband could advance a claim only by actio mandati or negotiorum gestorum, Cod. 5. 13. 5 e. The old retentiones propter liberos, propter mores, etc., described by Ulpian, Reg. 6. 9–12, were obsolete in the time of Justinian.

§ **38.** If the societas was omnium bonorum, the partner against whom the actio pro socio was brought could plead beneficium competentiae as a matter of right; in other cases, the praetor would grant it only after investigation: 'quod autem de sociis dictum est, ut et hi in quantum facere possint condemnentur, causa cognita se facturum praetor edicit' Dig. 42. 1. 22. 1: see note on p. 448 supr.

est, si quis ex donatione sua conveniatur. Compensationes 39
quoque oppositae plerumque efficiunt, ut minus quisque consequatur, quam ei debeatur : namque ex bono et aequo, habita ratione eius, **quod invicem actorem ex eadem causa praestare oporteret, in reliquum eum cum quo actum est condemnare** G. iv. 61.
licet, sicut iam dictum est. Eum quoque, qui creditoribus suis 40
bonis cessit, si postea aliquid adquisierit, quod idoneum emolumentum habeat, ex integro in id quod facere potest creditores cum eo experiuntur : inhumanum enim erat spoliatum fortunis suis in solidum damnari.

VII

QUOD CUM EO QUI IN ALIENA POTESTATE EST NEGOTIUM GESTUM ESSE DICITUR

Quia tamen superius mentionem habuimus de actione, quae in peculium filiorum familias servorumque agitur : opus G. iv. 69.

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§ **39**. See notes on § 30 supr.

§ **40**. For cessio bonorum see p. 390 supr.

Tit. VII. The rule of the civil law, already more than once alluded to, was that in no case could any liability attach to a man upon the contracts made by those in his power, whether slaves or children : 'melior condicio nostra per servos fieri potest, deterior fieri non potest' Dig. 50. 17. 133 ; cf. Tit. 6. 10 supr. The manifest injustice of this in concrete cases led to a praetorian change, by which one with whom a slave contracted, and who previously had no remedy against any one, was enabled, under certain circumstances, to sue the master, or one with whom a filiusfamilias contracted could sue the father in preference to the son, against whom of course he had always had his remedy. The extent to which the pater or dominus was thus made answerable varied according to the circumstances of the case. In some cases he became liable to the creditor in solidum, as where he had, either expressly or by implication, directed or subsequently adopted the contract ; in others his obligation was not coextensive with that of the son, as where he knew nothing of the transaction, and had derived no personal advantage from it. Of these variations in the superior's liability a full and precise account is given in this Title. The six praetorian actions by which he could be made to discharge the obligation, and which are here discussed, are called by the commentators actiones adiectitiae qualitatis (after Dig. 14. 1. 5. 1, cited in Excursus IX supr. ; cf. Dig. 45. 1. 91. 5 'filiusfamilias, qui iussu patris promisit . . . quasi accessionem intellegens eum qui iubeat') because they are alternative to the remedy against the actual contractor, or give the creditor a remedy where he had none at all by the civil law. The advantage of

est, ut de hac actione et de ceteris, quae eorundem nomine in parentes dominosve dari solent, diligentius admoneamus. et quia, sive cum servis negotium gestum sit sive cum his, qui in potestate parentis sunt, fere eadem iura servantur, ne verbosa fiat disputatio, dirigamus sermonem in personam servi dominique, idem intellecturi de liberis quoque et parentibus, quorum in potestate sunt. nam si quid in his proprie observetur, separatim ostendimus.

G. iv. 70. 1 **Si igitur iussu domini** cum servo **negotium gestum erit, in solidum praetor adversus dominum actionem** pollicetur, scilicet
2 **quia qui ita contrahit fidem domini sequi videtur. Eadem**
G. iv. 71. **ratione** praetor **duas alias in** solidum **actiones** pollicetur, quarum altera **exercitoria,** altera **institoria** appellatur. **exercitoria tunc locum habet, cum quis servum suum magistrum navis praeposuerit et quid cum eo eius rei gratia, cui praepositus erit, contractum fuerit. ideo autem exercitoria vocatur, quia**

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the change was not all for the creditor, for it enabled men to freely employ their children and slaves as agents in contracts generating bilateral obligation, and so largely facilitated the business of everyday life; the wider benefit of two of these actions in the same direction has already been explained in the Excursus referred to.

The reference in the first line of the text is to Tit. 6. 8, 10 and 36 supr. Slaves and children in power do not stand on precisely the same footing in this matter (*fere* eadem iura servantur): see § 7 inf. and Bk. iii. 19. 6 supr.

§ **1.** The actio quod iussu lay whether the iussus was given to the slave (Dig. 14. 5. 2; 15. 4. 1. 2) or to the third party with whom he contracted, Dig. 15. 4. 1. 1, Cod. 4. 26. 13, but only where the contract was made on behalf or in the interest of the dominus or pater: 'quid si dominus fide iusserit pro servo? ait Marcellus, non teneri quod iussu, quasi extraneus intervenit' Dig. 15. 4. 1. 5; this, however, is disputed, some maintaining exactly the opposite view, and others holding that it is immaterial whether the slave or son makes the contract for himself or for the superior. If the contract was in reality the master's own, and he used the slave merely as an instrument (nuntius, Bk. iii. 22 supr.), he could be sued by direct action upon it, as the only true contractor, Dig. ib. 5. pr. Subsequent ratification had the same effect as a precedent iussus: 'si ratum habuerit quis quod servus eius gesserit vel filius, quod iussu actio in eos datur' ib. 1. 6.

§ **2.** The two actions described in this section were due to the insufficiency of quod iussu, which was inapplicable without a specific authorization, or where the agent was an extranea persona. The appointment of filiifamilias or slaves, especially the latter, to manage some branch of trade or business (for examples see Mr. Poste's note on Gaius iv. 71),

exercitor appellatur is, ad quem cottidianus navis quaestus pertinet. institoria tunc locum habet, cum quis tabernae forte aut cuilibet negotiationi servum praeposuerit et quid cum eo eius rei causa, cui praepositus erit, contractum fuerit. ideo autem institoria appellatur, quia qui negotiationibus praeponuntur institores vocantur. Istas tamen duas actiones praetor reddit et si liberum quis hominem aut alienum servum navi aut tabernae aut cuilibet negotiationi praeposuerit, scilicet quia eadem aequitatis ratio etiam eo casu interveniebat. In- 3 G. iv. 72.
troduxit et aliam actionem praetor, quae tributoria vocatur. namque si servus in peculiari merce sciente domino negotietur et quid cum eo eius rei causa contractum erit, ita praetor ius dicit, ut, quidquid in his mercibus erit quodque inde receptum

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or to command a merchant vessel was extremely common at Rome, and unless the principal had been liable on contracts made by such agents within the scope of their commission, more particularly in the case of slaves, business would have been much hampered: 'cum interdum ignari, cuius sint condicionis et quales, cum magistris propter navigandi necessitatem contrahamus' Dig. 14. 1. 1. pr. It would seem that both of these actions were originally designed to render only masters and fathers liable, and were subsequently extended to cases where the agent was an extranea persona; Gaius iv. 71. The better opinion seems to be that neither quod iussu, institoria nor exercitoria lay against the principal unless the third party was aware, at the time of contracting, that the other was an agent: Girard, 4th ed. p. 664, note 4.

§ 3. The actio tributoria could come into application only where the slave (or filiusfamilias) who traded with a merx peculiaris sciente domino (or patre) found himself embarrassed and unable to satisfy his trade creditors in full; here the latter could demand a distribution among themselves of that portion of the peculium which had been embarked in the business in the ratio of their several claims. The division was made by the dominus, who was treated as an ordinary creditor, and therefore could not deduct debts owing to himself in full, though he had the privilege of paying all his own claims pro rata, whether arising out of the business or not, Dig. 14. 4. 5, 6 and 7; the actio tributoria lay against the dominus to compel the distribution, or to bring it under judicial review if any creditor was dissatisfied with it. If the slave had his peculium engaged in different businesses, they were kept apart, the creditors in each being entitled to satisfaction only out of the capital embarked in that one upon which these debts arose, Dig. ib. 5, 15, 16. Any creditor who got his debts paid in full while the solvency of the affair was unsuspected had to bind himself to refund in case any others should present their claims: 'non enim haec actio, sicut de peculio, occupantis meliorem condicionem facit, sed aequalem condicionem quandoque agentium' Dig. ib. 6.

erit, id inter dominum, si quid ei debebitur, et ceteros creditores pro rata portione distribuatur. et quia ipsi domino distributionem permittit, si quis ex creditoribus queratur, quasi minus ei tributum sit, quam oportuerit, hanc ei actionem accommodat, quae tributoria appellatur.

4 Praeterea introducta est actio de peculio deque eo, quod in rem domini versum erit, ut, quamvis sine voluntate domini negotium gestum erit, tamen sive quid in rem eius versum fuerit, id totum praestare debeat, sive quid non sit in rem eius versum, id eatenus praestare debeat, quatenus peculium patitur. In rem autem domini versum intellegitur, quidquid necessario in rem eius impenderit servus, veluti si mutuatus pecuniam creditoribus eius solverit aut aedificia ruentia fulserit aut familiae frumentum emerit vel etiam fundum aut quamlibet

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§ 4. Hitherto we have had to consider only contracts made by a slave with his master's knowledge or even by his express authority; upon which, for that very reason, the master was held liable in solidum, or at any rate was compellable to pay up to a certain limit, without his own claims enjoying any priority over those of ordinary trade creditors. This section deals with his liability on most of the slave's other contracts—those which he made without the master's knowledge, or even against his orders (' etiamsi prohibuerit contrahi cum servo dominus, erit in eum de peculio actio ' Dig. 15. 1. 29. 1), but not upon obligations arising from delict (Dig. ib. 3. 12), or from contracts which were merely gifts to the other party, Dig. 39. 5. 7, or from those which a filiusfamilias made on the strength of peculium castrense or quasi-castrense, Dig. 49. 17. 18. 5. Here the creditor is enabled to sue the dominus by the actio de peculio et in rem verso, in which two questions usually lie for the judge's consideration; (1) has the master himself derived any material advantage from the contract in question? No stress can here be laid on the language of the text above, which suggests that the dominus was liable only if the expenditure of the slave upon his affairs was necessary (necessario . . . rem necessariam); in Dig. 15. 3. 3. 2 and 4; ib. 5. pr. and 2 expenditure which is utilis, and in 3. 4 of the same Title an outlay which merely ' ad voluptatem domini spectat ', are said to be recoverable by de in rem verso; and in fact this action lay wherever actio mandati or negotiorum gestorum would lie: ' et regulariter dicimus totiens de in rem verso esse actionem, quibus casibus procurator mandati, vel qui negotia gessit, negotiorum gestorum haberet actionem, quotiensque aliquid consumsit servus, ut aut meliorem rem dominus habuerit, aut non deteriorem ' Dig. 15. 3. 3. 2. If in rem versio in this sense could be established, the master's own means were liable pro tanto; and the advantage which he had derived might have been so great that the creditor might conceivably obtain full payment in this manner, as e. g. where the slave had borrowed

aliam rem necessariam mercatus erit. Itaque si ex decem ut puta aureis, quos servus tuus a Titio mutuos accepit, creditori tuo quinque aureos solverit, reliquos vero quinque quolibet modo consumpserit, pro quinque quidem in solidum damnari debes, pro ceteris vero quinque eatenus, quatenus in peculio sit: ex quo scilicet apparet, si toti decem aurei in rem tuam versi fuerint, totos decem aureos Titium consequi posse. licet enim una est actio, qua de peculio deque eo quod in rem domini versum sit agitur, tamen duas habet condemnationes. itaque iudex, apud quem de ea actione agitur, ante dispicere solet, an in rem domini versum sit, nec aliter ad peculii aestimationem transit, quam si aut nihil in rem domini versum intellegatur aut non totum. **Cum autem quaeritur, quantum** G. iv. 73.
in peculio sit, ante deducitur, quidquid servus domino quive in potestate eius sit debet, et quod superest, id solum peculium intellegitur. aliquando tamen id, quod ei debet servus, qui in potestate domini sit, non deducitur ex peculio, veluti si is in huius ipsius peculio sit. quod eo pertinet, ut, si quid vicario suo servus debeat, id ex peculio eius non deducatur.

Ceterum dubium non est, quin is quoque, qui iussu domini 5 G. iv. 74.
contraxerit cuique institoria vel exercitoria actio competit, de peculio deque eo, quod in rem domini versum est, agere possit: sed erit stultissimus, si omissa actione, qua facillime

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50*l.*, and spent the whole of it in paying his master's debts. But (2) if the master has derived no material benefit from the slave's contract, or at least not enough to make him liable to the creditor in solidum, the judge has to inquire into the amount of the slave's peculium (deducting the master's own claims against it), and to condemn the dominus to pay the creditor from it what is due to him, so far as it extends at the date of the condemnation, Dig. 15. 1. 30. pr. The master's liability to de peculio lasted for an annus utilis after the slave was alienated or manumitted, Dig. 15. 2. 1. The reason why the dominus here enjoyed the privilege, which he did not possess under the circumstances described in § 3 supr., of paying his own claims against the slave from the peculium in full, was the fact that here the contract had in no way been sanctioned by him.

For vicarii servi see on Bk. ii. 20. 17 supr. 'Id, quod ipsis (sc. vicariis) debet ordinarius servus, non deducetur de peculio ordinarii servi, quia peculium eorum in peculio ipsius est': cf. Theophilus, *ἵνα μὴ τὸ αὐτὸ πρόσωπον εὑρεθῇ δύο ἐναντία ποιοῦν, καὶ αὖξον καὶ ἀπομειοῦν τὸ* peculium.

§ 5. An advantage of de peculio over tributoria has been already pointed out in the passage cited at the end of note on § 3 supr. Gaius

solidum ex contractu **consequi possit, se ad difficultatem perducat probandi in rem domini versum esse, vel habere** servum **peculium** et tantum habere, ut solidum sibi solvi G. iv. 74a. possit. **Is quoque, cui tributoria actio competit,** aeque **de peculio et in rem verso agere potest: sed sane huic** modo tributoria expedit agere, modo de peculio et in rem verso. **tributoria** ideo expedit agere, quia in ea domini condicio praecipua non est, id est quod domino debetur non deducitur, sed eiusdem iuris est dominus, cuius et ceteri creditores: **at in actione de peculio** ante deducitur quod domino debetur et in id quod reliquum est creditori dominus condemnatur. rursus de peculio ideo expedit agere, quod in hac actione **totius peculii ratio habetur,** at **in tributoria eius** tantum, **quod negotiatur, et potest quisque tertia forte parte peculii aut quarta vel etiam minima negotiari, maiorem autem partem** in praediis et mancipiis aut fenebri pecunia **habere.** prout ergo expedit, ita quisque vel hanc actionem vel illam eligere debet: certe qui potest probare **in rem domini versum esse,**
6 **de in rem verso agere debet.** Quae diximus de servo et domino, eadem intellegimus et de filio et filia aut nepote
7 et nepte, patre avove cuius in potestate sunt. Illud proprie servatur in eorum persona, quod senatus consultum Mace-

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(iv. 74) thinks the former remedy as a rule preferable to the latter. As soon as the action selected had reached litis contestatio, the other was extinguished on account of the identity of the obligation which they lay to enforce, Dig. 14. 4. 9. 1: p. 493 supr.

§ 6. But the filiusfamilias, unlike the slave, could be sued in person on his own contracts; for the effect of judgment recovered against him see on Tit. 5. 2 supr. Sometimes too a man was liable on a contract when made by his son, but not when made by his slave: 'sed si filius fideiussor vel quasi interventor acceptus sit, an de peculio patrem obliget quaeritur. Et est vera Sabini et Cassii sententia existimantium semper obligari patrem de peculio, et distare in hoc a servo' Dig. 15. 1. 3. 9.

§ 7. The last two lines of this section lend some colour to the story related by Theophilus, that the SC. Macedonianum, which was passed in the time of either Claudius or Vespasian, derived its name from one Macedo who committed the crime of parricide in order to relieve himself from his pecuniary difficulties; cf. p. 48 supr. The enactment related to no contracts except loans of money, and to these it applied even if veiled beneath some transaction ostensibly of a different nature: 'sed si fraus sit senatus consulto adhibita, puta frumento vel vino vel oleo mutuo dato, ut his distractis fructibus uteretur pecunia, subveniendum est filiofamilias'

donianum prohibuit mutuas pecunias dari eis, qui in parentis erunt potestate: et ei qui crediderit denegatur actio tam adversus ipsum filium filiamve nepotem neptemve, sive adhuc in potestate sunt, sive morte parentis vel emancipatione suae potestatis esse coeperint, quam adversus patrem avumve, sive habeat eos adhuc in potestate sive emancipaverit. quae ideo senatus prospexit, quia saepe onerati aere alieno creditarum pecuniarum, quas in luxuriam consumebant, vitae parentium insidiabantur. Illud in summa admonendi sumus id, quod 8
iussu patris dominive contractum fuerit quodque in rem eius

Dig. 14. 6. 7. 3; and the age or rank of the filius by whom the money was borrowed was immaterial: 'in filiofamilias nihil dignitas facit quominus senatus consultum Macedonianum locum habeat: nam etiamsi consul sit vel cuiusvis dignitatis, senatus consulto locus est' Dig. ib. 1. 3. The effect of the enactment was not to avoid the loan (so that it is weaker in its operation than the SC. Velleianum, p. 429 supr.), but simply to refuse an action for its recovery, or, if an action were in fact granted by the praetor because the facts were doubtful, to enable the defendant, if he could prove his title to the benefit of the law, to repel the plaintiff by exceptio SC[i]. Macedoniani. Thus the obligation to repay the money subsisted naturaliter, so that condictio indebiti was excluded, though if the filius paid with money of his father's, the latter could recover it by vindicatio so long as the creditor still had it in his hands.

The senatusconsult, however, had no application in the following cases. The filiusfamilias himself was liable (1) if he had a peculium castrense or quasi-castrense, Dig. 14. 6. 2; (2) if after becoming sui iuris he ratified the contract (Cod. 4. 28. 2) either expressly or by implication; e. g. by repaying part of the loan. And either the son could be sued by direct action, or the father by actio adiectitiae qualitatis, (1) if the lender had reason for believing the filiusfamilias to be sui iuris, Dig. 14. 6. 3. pr. and 1. (2) If and so far as the loan was in rem patris versum, Dig. ib. 7. 12–14. (3) If the paterfamilias consented to the transaction, Cod. 4. 28. 2. Consent might be inferred from conduct, such as standing by and allowing the money to be lent, Dig. ib. 12 and 16, or his making the son his institor, or allowing him to trade with a peculium profectitium. Subsequent ratification by the pater, express or implied, had the same effect, Cod. 4. 28. 7. pr. (4) If the loan was contracted to pay a creditor against whom the senatusconsult could not be pleaded, Dig. ib. 7. 14. (5) If the son at the time of borrowing the money was a soldier, Cod. 4. 28. 7. 1. (6) If there was no genuine loan owing to the lender's defective capacity of alienation, as where he was a pupillus or alieni iuris, Dig. ib. 3. 2. If the creditor was a minor, he could get himself in integrum restitutus in spite of the senatusconsult, Dig. 4. 4. 11. 7. The exceptio SC[i]. Macedoniani could be pleaded also by the filiusfamilias' surety, if the latter had a ius regressus against him, Dig. 14. 6. 9. 3.

versum fuerit, directo quoque posse a patre dominove condici, tamquam si principaliter cum ipso negotium gestum esset. ei quoque, qui vel exercitoria vel institoria actione tenetur, directo posse condici placet, quia huius quoque iussu contractum intellegitur.

VIII

DE NOXALIBUS ACTIONIBUS

G. iv. 75. **Ex maleficiis servorum, veluti si furtum fecerint aut** bona rapuerint aut damnum dederint **aut iniuriam commiserint,**

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§ **8.** So too it is said in Dig. 12. 1. 29; 14. 3. 17. 4 and 5, that a direct condictio will lie against the dominus in lieu of actio institoria. It is, however, not a necessary inference from such passages that the civil law modified its own maxim, stated in the first note on this Title, though this is the explanation of Schrader, who says 'forsan civiles actiones, olim paucis casibus datae, postea demum ita creverunt, ut eundem fere ambitum, quem honorariae statim ab initio occupabant, tenerent'. But, as Savigny remarks (Oblig. § 54), this makes it difficult to understand why the actiones adiectitiae qualitatis should be described in the Corpus iuris as not only still useful but indispensable; and Savigny himself, noticing that it is only condictio (and not actiones civiles in general) which is spoken of as alternative to the praetorian remedies, limits its application to cases where the slave or filiusfamilias had borrowed money with the superior's consent, or spent it, when borrowed, in his interest. This conjecture is supported by the fact that in the text above the concurrence of condictio with the actiones adiectitiae qualitatis is generally affirmed, with the exception of de peculio; and (as we have just seen) if a filiusfamilias borrowed money, both condictio and de peculio were barred by the SC. Macedonianum, Cod. 4. 28. 6, Dig. 14. 6. 7. 10, which, however, did not exclude institoria and the rest. Another view is that the ground of the condictio was not the slave's or filiusfamilias' contract, but the simple fact that the superior had been enriched at the cost of the other contracting party.

Tit. VIII. If a slave committed a delict by his master's orders, the latter alone was answerable: 'servus nil deliquit qui domino iubenti obtemperavit'; and even in other cases, if the master suspected and could have prevented the wrong, the injured person had his choice between a direct and a noxal action, Dig. 9. 4. 2–5. Otherwise the slave only was directly liable, and if manumitted could be sued, § 5 inf., Dig. ib. 6; unless it was against his own master that the delict had been committed, § 6 inf. While, however, he remained a slave no action could be brought against him, and accordingly the master could be sued on his account, though, as he was not bound to defend, he would in many cases prefer to surrender him to the plaintiff if the proofs were clear. If he defended the action, it was called noxalis because the defendant had the option, if the guilt of the slave was proved, of surrendering him to the plaintiff in lieu of paying

noxales actiones proditae sunt, quibus **domino** damnato permittitur **aut litis aestimationem sufferre aut** hominem **noxae dedere.** Noxa autem est corpus quod nocuit, id est servus : 1
noxia ipsum maleficium, veluti furtum damnum rapina iniuria.
Summa autem ratione permissum est noxae deditione de- 2
fungi : **namque erat iniquum nequitiam eorum ultra ipsorum corpora dominis damnosam esse.** Dominus noxali iudicio 3
servi sui nomine conventus servum actori noxae dedendo liberatur. nec minus perpetuum eius dominium a domino transfertur : si autem damnum ei cui deditus est resarcierit quaesita pecunia, auxilio praetoris invito domino manumit-

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the damages assessed : 'praetor ait . . . si servus insciente domino fecisse dicetur, in iudicio adiciam "aut noxam dedere"' Dig. 9. 3. 1. pr. Noxal actions are thus not a class of remedies apart by themselves, but only ordinary actions on a delictal or quasi-delictal obligation (Dig. loc. cit.), in which the defendant, being sued on a wrong not of his own commission, is allowed by special provision (§ 4 inf.) a privilege which, had the offence been his own, he would not have enjoyed. In principle, though not in form, they are arbitrariae (Tit. 6. 31 supr.) ; the noxae deditio is not made in accordance with the judge's arbitrium, but the defendant is condemned in the alternative, Tit. 17. 1 inf. The obligation of the master before litis contestatio, and after judgment, is what is termed 'facultative': it has but one object, from which, however, the person liable can discharge himself by performing some other act. In the interval it is alternative. If the slave died before litis contestatio in the action, the master's liability ended, even though his death was unknown, Dig. 9. 4. 39. 4 ; ib. 42. 1 : by his death during the action the master's liability in damages became absolute.

It has been conjectured that noxal actions were originally the expression of an absolute claim to have the offender delivered up for the exercise of private vengeance, whether his offence were delictal or merely breach of contract. The surrender of Postumius to the Samnites by the Romans with all the forms of noxae deditio (Livy ix. 10) was made as atonement for non-observance of the treaty which he had concluded with them, and from which the Romans wished to release themselves—ut populus religione solvatur. Under Roman municipal law non-fulfilment of a promise made by sponsio entailed, in the end, quasi-slavery (manus iniectio) ; and the idea was consistently applied by them in international relations ; cf. Ihering, Geist des r. Rechts i. p. 131 ; Mr. Justice O. W. Holmes' Common Law pp. 8–12, and Mr. Poste's note on Gaius iv. 81.

§ 3. The rule that if the surrendered slave subsequently contrived to pay the damages he could demand his manumission, appears to have originally held only where the deditus was a child in power ; 'per hominem liberum noxiae deditum si tantum adquisitum sit, quantum damnum

4 tetur. Sunt autem constitutae noxales actiones aut legibus
G.iv.76. aut edicto praetoris: legibus veluti furti lege duodecim tabu-
larum, damni iniuriae lege Aquilia; edicto praetoris veluti
G.iv.77. 5 iniuriarum et vi bonorum raptorum. Omnis autem noxalis
actio caput sequitur. nam si servus tuus noxiam commiserit,
quamdiu in tua potestate sit, tecum est actio: si in alterius
potestatem pervenerit, cum illo incipit actio esse, aut si manu-
missus fuerit, directo ipse tenetur et extinguitur noxae deditio.
ex diverso quoque directa actio noxalis esse incipit: nam si
liber homo noxiam commiserit et is servus tuus esse coeperit
(quod casibus quibusdam effici primo libro tradidimus), incipit
G.iv.78. 6 tecum esse noxalis actio, quae ante directa fuisset. Si servus
domino noxiam commiserit, actio nulla nascitur: namque inter
dominum et eum qui in eius potestate est nulla obligatio nasci
potest. ideoque et si in alienam potestatem servus pervenerit
aut manumissus fuerit, neque cum ipso neque cum eo, cuius
nunc in potestate sit, agi potest. unde si alienus servus
noxiam tibi commiserit et is postea in potestate tua esse
coeperit, intercidit actio, quia in eum casum deducta sit in
quo consistere non potuit: ideoque licet exierit de tua potestate,
agere non potes, quemadmodum si dominus in servum suum
aliquid commiserit, nec si manumissus vel alienatus fuerit

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dedit, manumittere cogendus est a praetore qui noxa deditum accepit, sed fiduciae iudicio non tenetur' Papinian, Coll. 2. 3.

§ 4. The four delicts are mentioned only exempli gratia, as appears from veluti . . . veluti: a noxal action was given upon quasi-delictal obligations as well, Dig. 47. 1. 1. 2; 47. 7. 7. 5.

§ 5. For the modes in which a free man could become a slave see Bk. i. 3. 4, and notes supr.

§ 6. The first few lines of this section are open to misconception. It was not merely that no action lay upon a delict committed by a slave against his dominus, but it gave rise to no obligation whatever—doubtless because the master could get him punished by an appeal to the extraordinaria cognitio of the praetor, or even inflict the penalty in person if the offence were a light one. Nor is it true that 'inter dominum et eum qui in potestate eius est nulla obligatio nasci potest': between master and slave, pater and filiusfamilias, there could be naturalis but not civilis obligatio, Tit. 7. 3 supr., Dig. 12. 6. 64; 44. 7. 14.

The Proculians had maintained that the action for the delict of a slave was not extinguished by his coming under the power of the injured person, but only suspended, 'cum vero exierit de mea potestate, tunc eam resuscitari' Gaius iv. 78.

servus, ullam actionem contra dominum habere potest. Sed 7
veteres quidem haec et in filiis familias masculis et feminis admiserunt. nova autem hominum conversatio huiusmodi asperitatem recte respuendam esse existimavit et ab usu communi haec penitus recessit: quis enim patitur filium suum et maxime filiam in noxam alii dare, ut paene per corpus pater magis quam filius periclitetur, cum in filiabus etiam pudicitiae favor hoc bene excludit? et ideo placuit in servos tantummodo noxales actiones esse proponendas, cum apud veteres legum commentatores invenimus saepius dictum ipsos filios familias pro suis delictis posse conveniri.

IX

SI QUADRUPES PAUPERIEM FECISSE DICITUR

Animalium nomine, quae ratione carent, si quidem lascivia aut fervore aut feritate pauperiem fecerint, noxalis actio lege duodecim tabularum prodita est (quae animalia si noxae de-

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For applications of the rule 'quae in eam causam pervenerunt a qua incipere non poterant pro non scriptis habentur' cf. Bk. ii. 20. 14; iii. 19. 2 supr., and Dig. 5. 1. 11; 8. 1. 11; 9. 2. 16; 34. 8. 3. 2.

§ 7. The noxal surrender of filiifamilias (Gaius iv. 74, 79 speaks only of *sons*) was effected by mancipatio; they stood in mancipio to the surrenderee (note on Bk. i. 8 supr.), the Sabinians holding that one sale was sufficient for this purpose, 'crediderunt enim tres lege duodecim tabularum ad voluntarias mancipationes pertinere' Gaius iv. 79.

Among the 'veteres legum commentatores' are Gaius himself, Dig. 44. 7. 39; Pomponius, Dig. 9. 4. 33; Julianus, ib. 34, and Ulpian, Dig. 5. 1. 57; 9. 3. 1. 7; 9. 4. 35. For Justinian's affectation of legal conservatism cf. Bk. ii. 14. pr., ii. 20. 34 supr. On the whole subject of noxal surrender see a note in Mr. Roby's edition of Dig. 7. 1. pp. 132–137.

Tit. IX. The conditions under which the noxal actio de pauperie lay are accurately stated in this Title. By the Twelve Tables the animal must be four-footed (Dig. 9. 1. 1. 2), but by construction the remedy was extended: 'haec actio utilis competit, si non quadrupes sed aliud animal pauperiem fecit' Dig. ib. 4. If the damage was done under provocation, the noxal action did not lie, but the person who was its indirect cause was liable: 'et generaliter haec actio locum habet, quotiens contra naturam fera mota pauperiem dedit. Ideoque si equus dolore concitatus calce petierit, cessare istam actionem, sed eum, qui equum percusserit aut vulneraverit, in factum . . . teneri: at si cum equum permulsisset quis vel palpatus esset, calce eum percusserit, erit actioni locus' Dig. ib. 1. 7. Damage done by an animal which fell within the rule was treated exactly like a delict committed by a slave: 'et cum etiam in quadrupedibus noxa caput sequitur, adversus dominum haec actio datur, non cuius fuerit

dantur, proficiunt reo ad liberationem, quia ita lex duodecim tabularum scripta est): puta si equus calcitrosus calce percusserit aut bos cornu petere solitus petierit. haec autem actio in his, quae contra naturam moventur, locum habet: ceterum si genitalis sit feritas, cessat. Denique si ursus fugit a domino et sic nocuit, non potest quondam dominus conveniri, quia desinit dominus esse, ubi fera evasit. pauperies autem est damnum sine iniuria facientis datum: nec enim potest animal iniuriam fecisse dici, quod sensu caret. haec quod ad noxalem actionem pertinet.

1 Ceterum sciendum est aedilicio edicto prohiberi nos canem verrem aprum ursum leonem ibi habere, qua vulgo iter fit:

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quadrupes, cum noceret, sed cuius nunc est. Plane si ante litem contestatam decesserit animal, extincta erit actio' Dig. ib. 1. 12 and 13. So too if the animal died naturally or by accident, the owner's liability was extinguished, Dig. ib. 16.

The illustration of the bear might lead one to suppose that no noxal action lay where the animal which did the damage was ferae naturae. But this assumption is contradicted in the text below (§ 1 'praeter has autem aedilicias actiones et de pauperie locum habebit'); and though many are for rejecting this as bad law, it seems better to say that the actio de pauperie was available at any rate in the case of an animal which, though by birth ferae naturae, no longer enjoyed its natural liberty, but was in some degree tamed or domesticated, and so in doing injury might be said to be acting 'against its nature'.

The only case in which the owner of a domestic beast was liable for damage done secundum naturam suam was where grazing animals strayed and pastured on another's land (when an action lay under the Twelve Tables), or fed on mast which fell on their owner's land from a neighbour's trees: 'si glans ex arbore tua in meum fundum cadat, eamque ego immisso pecore depascam, Aristo scribit, non sibi occurrere legitimam actionem, qua experiri possis, nam neque ex lege duodecim tabularum de pastu pecoris, quia non in tuo pascitur, neque de pauperie, neque damni iniuriae agi posse: in factum itaque erit agendum' Dig. 19. 5. 14. 3.

§ 1. The public roads were under the special charge of the aediles, Dig. 43. 10. The penalty prescribed in the edict for the death of a freeman was 200 solidi; for injury other than death a sum which was left to the discretion of the judge; for all other damage duplum. The action under this edict seems to have been popularis.

Two or more actions are said to concur when one and the same material claim can be pursued wholly or in part by two or more distinct remedies. Examples may be found in Tit. 6. 14, Tit. 7. 5 supr., in cases of passive correal and solidary obligation, and in the violation of different rights of the same person by one single act, as where a borrower damages the res commodata, thereby exposing himself to actio commodati and an

et si adversus ea factum erit et nocitum homini libero esse dicetur, quod bonum et aequum iudici videtur, tanti dominus condemnetur, ceterarum rerum, quanti damnum datum sit,

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action under the lex Aquilia, Dig. 13. 6. 7. 1. The principle which governs such cases is contained in the maxim 'bona fides non patitur, ut bis idem exigatur' Dig. 50. 17. 57. Hence, if one action is brought by which the claim is fully satisfied, the right to bring the other is extinguished; but if the plaintiff first sues by the one which gives him a less satisfaction than he could have obtained by the other, the other can yet be brought for the difference: 'si ex eodem facto duae competant actiones, postea iudicis potius partes esse, ut quo plus sit in reliqua actione, id actor ferat, si tantundem aut minus, nil consequatur' Dig. 44. 7. 41. 1.

In the application of these principles to penal actions, of which the text above more particularly speaks, a distinction must be drawn. Sometimes when more rights than one are violated by one and the same unlawful act, this act can be analysed, in the eye of the law, into as many separate acts as there are rights violated; and in such a case the penal actions which lie on these several wrongs exist quite independently of one another, and can be separately brought in solidum. Illustrations may be found in a single speech which slanders two or more persons, Dig. 47. 10. 41; in the theft of a slave's clothes, through which he dies of exposure, Dig. 19. 5. 14. 1, where the actiones furti and damni iniuria each lie, and the full penalty can be recovered on each; and in Tit. 1. 8 supr., where the master can bring both actio furti and actio servi corrupti, 'nec sufficiet, alterutra actione egisse, quia altera alteram non minuit' Dig. 11. 3. 11. 2.

But one and the same unlawful act may be ground for two or more penal actions in a rather different manner; that is to say, each, or at any rate one, of them requires the whole act to support it. E. g. for secretly cutting down another's trees one is liable under both the Twelve Tables (de arboribus furtim caesis) and the lex Aquilia; and so too the same act will often support an action on either theft or robbery. To admit both actions in such cases would be to punish at least part of the unlawful act upon which they are based twice over; and the actual practice was to allow the person wronged, if he first brought the action by which he could recover least, to subsequently bring the second for the difference, Dig. 44. 7. 41. 1 cited supr. The application of this principle to penal actions is clearly shown by the following passages: 'qui servum alienum iniuriose verberat, ex uno facto incidit et in Aquiliam et in actionem iniuriarum: iniuria enim ex adfectu fit, damnum ex culpa, et ideo possunt utrae competere: sed quidam altera electa alteram consumi: alii per legis Aquiliae actionem iniuriarum consumi, quoniam desiit bonum et aequum esse condemnari eum, qui aestimationem praestitit, sed si ante iniuriarum actum esset, teneri eum ex lege Aquilia. Sed et haec sententia per praetorem inhibenda est, nisi in id, quod amplius ex lege Aquilia competit, agatur: rationabilius itaque est, eam admitti sententiam, ut liceat ei quam voluerit actionem prius exercere, quod autem amplius in

dupli. praeter has autem aedilicias actiones et de pauperie locum habebit: numquam enim actiones praesertim poenales de eadem re concurrentes alia aliam consumit.

X

DE HIS PER QUOS AGERE POSSUMUS

G. iv. 82. **Nunc admonendi sumus agere** posse **quemlibet aut suo nomine aut alieno.** alieno **veluti procuratorio tutorio cura-**

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altera est, etiam hoc exsequi' Dig. 44. 7. 34. pr., 'si furtim arbores caesae sint, et ex lege Aquilia et ex duodecim tabularum dandam actionem Labeo ait. Sed Trebatius, ita utramque dandam, ut iudex in posteriore deducat id, quod ex prima consecutus sit, et reliquo condemnet' Dig. 47. 7. 1, 'qui rem rapuit, et furti nec manifesti tenetur in duplum, et vi raptorum in quadruplum: sed si ante actum sit vi bonorum raptorum, deneganda est furti, si ante furti actum sit, non est illa deneganda, ut tamen id, quod amplius in ea sit, consequatur' Dig. 47. 2. 88. This conclusion seems at first sight to be contradicted by a dictum of Modestinus, 'plura delicta in una re plures admittunt actiones, sed non posse omnibus uti probatum est: nam si ex una obligatione plures actiones nascuntur, una tantummodo, non omnibus utendum est' Dig. 44. 7. 53. pr.; but this may be taken to mean that the several actions cannot all be brought with full effect; and the proposition would be true invariably if the injured person, where he had an alternative, was careful enough to select the remedy by which he could recover the heaviest penalty.

Tit. X. Of the exceptions to the old rule nemo alieno nomine lege agere potest (Dig. 50. 17. 123) 'pro populo' refers to the actiones populares, and 'pro libertate' includes manumission per vindictam, p. 114 supr. Nothing further is known of the lex Hostilia. What is meant by 'pro tutela' in the text is much disputed: Theophilus' explanation of it by supposing a suit between two or more persons claiming a tutela is generally rejected, and perhaps it may be right to understand it of actions brought generally by the tutor in relation to the ward's property. The ancient definition of tutela as potestas (i. 13. 1 supr.) suggests that the tutor could sue upon all matters as a paterfamilias could: see Girard, Histoire de l'organisation judiciaire des Romains, p. 97, note 1. The Twelve Tables had also allowed the relations of a person who had suffered an aggravated outrage to sue for talio on his behalf, p. 537 supr.; and the legis actio repetundarum could, under the statutes by which it was regulated (e. g. Calpurnia, Servilia), be brought by a Roman citizen on behalf of the persons really injured.

The introduction of the formulary procedure facilitated representation of defendants no less than of plaintiffs. From this time onward it was allowed by the praetor with but slight limitations; the desired end being attained by the principal's name appearing in the intentio of the formula,

torio, cum olim in usu fuisset alterius nomine agere non posse nisi pro populo, pro libertate, pro tutela. praeterea lege Hostilia permissum est furti agere eorum nomine, qui apud hostes essent aut rei publicae causa abessent quive in eorum cuius tutela essent. et quia hoc non minimam incommoditatem habebat, quod alieno nomine neque agere neque excipere actionem licebat, coeperunt homines per procuratores litigare: nam et morbus et aetas et necessaria peregrinatio itemque aliae multae causae saepe impedimento sunt, quo

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the agent's in the condemnatio; e. g. 'si paret Caium Seio (principal) sestertium decem milia dare oportere, iudex Caium Titio (agent) sestertium decem milia condemna: si non paret, absolve' (Gaius iv. 86, 87). Of such agents there were two types. The older of these is the cognitor, who was appointed for a single action (in litem) in the presence of the other party, certis et sollemnibus verbis, the formulae of which are preserved by Gaius iv. 83. There could thus be no question of the cognitor's authority, and consequently he was identified with his principal throughout; his processual acts affected the latter exactly as if they had been his own: 'domini loco habetur' Gaius iv. 97. The other is the procurator, who might be a general agent, acting even without commission; 'quin etiam sunt qui putant vel eum procuratorem videri, cui non sit mandatum, si modo bona fide accedat ad negotium, et caveat rem ratam dominum habiturum; igitur etsi non edat mandatum procurator, nihilominus agere posse, quia saepe mandatum initio litis in obscuro est, et postea apud iudicem ostenditur' Gaius iv. 84. The procurator thus stood upon an altogether different footing from the cognitor, for the alleged principal might turn out to be no principal at all, or at any rate not to have consented to the agent's bringing or defending the action for him: consequently, he was not identified with the latter, as the cognitor was, and was in fact the real party to the action himself. Hence, if he appeared as plaintiff, the principal's right of action was not consumed, so that he could subsequently sue upon it himself (Gaius iv. 98), and the agent alone could bring actio iudicati against the defendant, if condemned, Fragm. Vat. 317; if he appeared as defendant, it was he, and not the principal, against whom the actio iudicati must be brought if the case went against him. The general consequence of this non-identification of procurator with his dominus was that he was allowed to appear as plaintiff or defendant only upon the condition that the other party to the action was fully protected against the risk of the principal's disowning his proceedings by subsequently suing upon the same ground himself, or by refusing to satisfy an adverse judgment. This was effected by the system of security described in the next Title.

Between Gaius and Justinian the cognitor disappeared, and when there was no doubt that a procurator really was what he held himself out to be, this form of representation was released from the inconveniences which

G. iv. 84. 1 minus rem suam ipsi exsequi possint. **Procurator neque certis verbis neque praesente adversario**, immo plerumque **ignorante eo constituitur** : cuicumque enim permiseris rem tuam agere
G. iv. 85. 2 aut defendere, is procurator intellegitur. **Tutores et curatores quemadmodum constituuntur, primo libro expositum est.**

XI

DE SATISDATIONIBUS

Satisdationum modus alius antiquitati placuit, alium novitas per usum amplexa est.

G. iv. 89. Olim enim **si in rem agebatur, satisdare** possessor compellebatur, **ut, si victus nec rem ipsam restitueret nec litis**

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previously had attended it, Tit. 11. 3 inf. Hence arose more formal, though of course still optional, modes of appointing such agents, the observance of which would place their authority beyond all doubt ; e. g. nomination in court, note on Tit. 11. 4 inf. ; registration in the acta, ib. 3, or a written notification addressed to the one party by the other, coupled with an undertaking to ratify the agent's proceedings, Dig. 3. 3. 65 ; and it became a recognized rule that where the principal's authority was delegated in any of these modes his right of action was consumed, Dig. 44. 2. 11. 7, and he could himself bring, or be sued by, the actio iudicati, Fragm. Vat. 331, 332. The latter action could still be brought against a procurator who was condemned (unless he was appointed in court, Tit. 11. 4 inf.), but apparently he could defend himself by the exceptio doli.

The word 'quemlibet' in the first line of the Title is not literally true; women and soldiers could be procurators only in rem suam, Tit. 13. 11 inf. ; and persons branded with infamia could neither be represented by agents themselves, Frag. Vat. 322, nor as a rule act as agents, except 'pro libertate' ib. 324.

§ 2. Under the older law tutors and curators had been treated like procurators, and required to give security both 'ratam rem dominum habiturum' and 'iudicatum solvi' ; though Gaius tells us, iv. 99 (cf. Tit. 11. pr. inf.), that they were sometimes excused : cf. Tit. 11. pr. ad fin. Under Justinian they stood on the same footing with procurators whose appointment had been formal, Dig. 26. 7. 2. pr.

Tit. XI. Satisdatio is properly a species of recognizance entered into by stipulation before the deliverance of the formula not only by the principal party, but also by sureties on his behalf, their liability and his being correal : 'satisdare dicimur adversario nostro cum pro eo quod a nobis petiit ita cavit, ut eum hoc nomine securum faciamus datis fideiussoribus' Dig. 2. 8. 1. In this specific sense it is contrasted in § 2 inf. with nuda promissio and promissio cum iureiurando, and in Dig. 46. 5. 7 with pignoribus datis cavere.

aestimationem, potestas esset petitori aut cum eo agendi aut cum fideiussoribus eius. quae satisdatio appellatur iudicatum solvi: unde autem sic appellatur, facile est intellegere: namque stipulatur quis, ut solveretur sibi quod fuerit iudicatum. multo magis is, qui in rem actione con- G. iv. 90.
veniebatur, satisdare cogebatur, si alieno nomine iudicium accipiebat. Ipse autem qui in rem agebat, si suo nomine G. iv. 96.
petebat, satisdare non cogebatur. procurator vero si in rem G. iv. 98.
agebat, satisdare iubebatur ratam rem dominum habiturum: periculum enim erat, ne iterum dominus de eadem re experiatur. tutores et curatores eodem modo quo et procuratores G. iv. 99.
satisdare debere verba edicti faciebant. sed aliquando his agentibus satisdatio remittebatur. Haec ita erant, si in rem 1 G. iv. 100.
agebatur. sin vero in personam, ab actoris quidem parte eadem optinebant, quae diximus in actione qua in rem agitur. ab eius vero parte cum quo agitur si quidem alieno nomine G. iv. 101.
aliquis intervenerit, omnimodo satisdaret, quia nemo defensor in aliena re sine satisdatione idoneus esse creditur. quod si G. iv. 102.
proprio nomine aliquis iudicium accipiebat in personam, iudicatum solvi satisdare non cogebatur.

Sed haec hodie aliter observantur. sive enim quis in rem 2

In real actions under the formulary system the satisdatio given by a defendant had varied with the form of the action itself. If this was formula petitoria the name of the security was iudicatum solvi (for which see on § 4 inf.); if it was per sponsionem, it was called pro praede litis et vindiciarum, Gaius iv. 91, 94 *a*. If the defendant was a procurator, he had to give satisdatio iudicatum solvi himself; if a cognitor, this was done by the principal, Gaius iv. 101. A cognitor who was plaintiff had not, like a procurator in the same position, to engage 'ratam rem dominum habiturum', because he was domini loco, Gaius iv. 97.

§ 1. To Justinian's statement that under the older system a defendant in a personal action who appeared himself had not to give security iudicatum solvi there are some exceptions. He had to do so 'propter genus actionis' in the actiones iudicati and depensi; when he was sued for retaining a portion of the divorced wife's dos and pleaded her immorality (cum de moribus mulieris agetur); and probably in the iudicium fructuarium in a double interdict, Gaius iv. 169. In other cases the defendant's own character or position justified the suspension of the ordinary rule, i.e. where he had been, was, or was suspected of being insolvent, Gaius iv. 102.

§ 2. Thus the engagement entered into in Justinian's time by a defendant who appeared in person covered the ground of both (1) the old vadi-

actione convenitur sive personali suo nomine, nullam satisdationem propter litis aestimationem dare compellitur, sed pro sua tantum persona, quod iudicio permaneat usque ad terminum litis, vel committitur suae promissioni cum iureiurando, quam iuratoriam cautionem vocant, vel nudam promissionem vel satisdationem pro qualitate personae suae dare
3 compellitur. Sin autem per procuratorem lis vel infertur vel suscipitur, in actoris quidem persona, si non mandatum actis insinuatum est vel praesens dominus litis in iudicio procuratoris sui personam confirmaverit, ratam rem dominum habiturum satisdationem procurator dare compellitur: eodem observando et si tutor vel curator vel aliae tales personae, quae alienarum rerum gubernationem receperunt, litem qui-
4 busdam per alium inferunt. Sin vero aliquis convenitur, si quidem praesens procuratorem dare paratus est, potest vel ipse in iudicium venire et sui procuratoris personam per iudi-

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monium or cautio iudicio sisti, Gaius iv. 185, which secured the appearance of the defendant in iure in cases of adjournment, and (2) the clause de re defendenda of the security iudicatum solvi; it bound him to appear in court on the day of trial and defend the action: but he was no longer required to guarantee satisfaction of the judgment. The ordinary mode of entering into this engagement was satisdatio; but even before the time of Gaius the praetor had drawn distinctions in vadimonia, being satisfied in some cases with a merely personal undertaking without sureties (vadimonium purum), and in others with such undertaking fortified by the oath or by a summary process for the recovery of the recognizance ('recuperatoribus suppositis' Gaius iv. 185). Under Justinian landowners (Dig. 2. 8. 15) and personae illustres (Cod. 12. 1. 17) could be compelled to bind themselves 'in iudicio permanere usque ad terminum litis' only by a written cautio iuratoria; it is not clear who were privileged to give a bare promise to this effect, though the edict seems to have contained careful regulations on the subject, Gaius loc. cit.: 'pro tenore generalium edictorum' Cod. 12. 22. 8.

§ 3. The general principle as to when a procurator who appears as plaintiff must give security ratam rem dominum habiturum is found in Cod. 2. 13. 1 'cautio ratihabitionis tunc exigitur a procuratore, quotiens incertum est an ei negotium mandatum est', cf. Dig. 3. 4. 6. 3 'si de decreto dubitetur, puto interponendam et de rato cautionem'. The agent was also exempted where his appointment was notified by letter to the other party, note on Tit. 10. pr. supr., or was evidenced by a libellus addressed to the emperor, Dig. 46. 8. 21.

§ 4. The meaning of 'praesens' is supplied by Dig. 3. 3. 5. 7: 'praesens habetur et qui in hortis est et qui in urbe et in continentibus aedificiis: et

catum solvi satisdationis sollemnes stipulationes firmare vel extra iudicium satisdationem exponere, per quam ipse sui procuratoris fideiussor existit pro omnibus iudicatum solvi satisdationis clausulis. ubi et de hypotheca suarum rerum convenire compellitur, sive in iudicio promiserit sive extra iudicium caverit, ut tam ipse quam heredes eius obligentur: alia insuper cautela vel satisdatione propter personam ipsius exponenda, quod tempore sententiae recitandae in iudicio invenietur, vel si non venerit, omnia dabit fideiussor, quae condemnatione continentur, nisi fuerit provocatum. Si vero **5**
reus praesto ex quacumque causa non fuerit et alius velit defensionem subire, nulla differentia inter actiones in rem vel personales introducenda potest hoc facere, ita tamen ut satisdationem iudicatum solvi pro litis praestet aestimatione. nemo enim secundum veterem regulam, ut iam dictum est, alienae rei sine satisdatione defensor idoneus intellegitur.

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ideo procurator eius praesentis esse videtur.' Thus if the procurator were appointed by the defendant himself in court, he was in the same position as a defendant's cognitor under the older system (Gaius iv. 101): his principal, not he, had to give security iudicatum solvi, either alone (cautio) or with sureties (satisdatio). If he were appointed out of court by a 'present' defendant, he had to give security himself, and his principal was his surety (fideiussor): 'in rem suam fideiubeant, ut pro suo procuratore' Dig. 2. 8. 8. 1. The security consisted of three clauses: 'iudicatum solvi stipulatio tres clausulas in unum collatas habet: de re iudicata, de re defendenda, de dolo malo' Dig. 46. 7. 6. By the first of these the man engaged, in case the action went against him, to restore the property to which it related, or pay the damages assessed by the judge (Gaius iv. 89): by the second, he promised to defend the action: by the third, to indemnify the plaintiff against malicious deterioration of the disputed property while in his hands. A difficulty is raised by the passage in the text which accounts for the compulsory hypotheca by the desire to bind the real defendant's heirs, for they were in point of fact already bound by his engagement iudicatum solvi. Perhaps this is to be explained by supposing that formerly the sureties in this security were sponsors or fidepromissors, whose liability did not descend to their successors (Gaius iii. 120), and that these lines have been transcribed from some old jurist into the Institutes by an oversight.

§ 5. A defensor was a person who without commission undertook the defence of another who through absence, insanity, minority, or some other cause neglected, or was unable, to appear for himself. Litis contestatio with the volunteer released the real defendant from all liability: 'solutione vel iudicium pro nobis accipiendo et inviti et ignorantes liberari possumus' Dig. 46. 3. 23; cf. Dig. 15. 3. 10. 1.

6 Quae omnia apertius et perfectissime a cottidiano iudiciorum
7 usu in ipsis rerum documentis apparent. Quam formam non solum in hac regia urbe, sed et in omnibus nostris provinciis, etsi propter imperitiam aliter forte celebrabantur, optinere censemus, cum necesse est omnes provincias caput omnium nostrarum civitatum, id est hanc regiam urbem, eiusque observantiam sequi.

XII

DE PERPETUIS ET TEMPORALIBUS ACTIONIBUS ET QUAE AD HEREDES VEL IN HEREDES TRANSEUNT

G. iv. 110. **Hoc loco admonendi sumus eas quidem actiones, quae ex lege senatusve consulto** sive ex sacris constitutionibus **proficiscuntur, perpetuo solere** antiquitus competere, donec sacrae

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§ 7. Cf. Justinian's comment on Zeno's constitution de aedificiis privatis in Cod. 8. 10. 13 'indignum esse nostro tempore putantes aliud ius in hac regia civitate de huiusmodi observari, aliud apud nostros esse provinciales, sancimus eandem constitutionem in omnibus urbibus Romani imperii optinere.'

Tit. XII. Originally all actions were perpetuae. Substantive 'antecedent or sanctioned' rights might be destroyed by lapse of time, e.g. that of the dominus by usucapio, and that of a creditor against a sponsor or fidepromissor under the two-year limitation of the lex Furia, p. 424 supr.: but there was no rule of law providing that rights of action should be barred unless issue were joined within a definite period from their accrual.

The praetor, however, provided that many of the new actions which he introduced through the edict should lie only within an annus utilis from the moment at which they first accrued, though between this period and his own limited tenure of office there does not seem to have been the connection suggested by Justinian in the text. By far the most important class of these annales actiones are the praetorian penal actions, with the exception of that on furtum manifestum, which remained perpetua because it was in commutation of a capital penalty, Gaius iv. 111, iii. 189; but even these were perpetuae so far as they were brought only to deprive the delinquent of any benefit he had derived from his wrong: 'in honorariis actionibus sic esse definiendum Cassius ait, ut quae rei persecutionem habeant, hae etiam post annum darentur, ceterae intra annum' Dig. 44. 7. 35. pr. Praetorian actions which were merely unilaterally penal (e. g. actio doli) were prescribed in such a year if contra ius civile, Dig. ib. Interdicts, so far as they were penal, were similarly limited: the actiones populares were all annales, Dig. 47. 23. 8: and the limitation of the aedilician actions on sale has been already noticed, p. 437 supr., as also

constitutiones tam in rem quam personalibus actionibus certos fines dederunt: **eas vero, quae ex propria praetoris iurisdictione pendent, plerumque intra annum** vivere (nam et ipsius praetoris intra annum erat imperium). **aliquando tamen et** G. iv. 111. **in perpetuum** extenduntur, id est usque ad finem constitutionibus introductum: **quales sunt hae, quas bonorum possessori ceterisque qui heredis loco sunt accommodat. furti quoque manifesti actio, quamvis ex ipsius praetoris iurisdictione proficiscatur,** tamen **perpetuo datur:** absurdum enim esse existimavit anno eam terminari. **Non omnes autem** 1 G.iv.112. **actiones, quae in aliquem aut ipso iure competunt aut a praetore dantur, et in heredem aeque competunt aut dari solent. est enim certissima iuris regula ex maleficiis poenales actiones**

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has the longi temporis praescriptio relating to actions for the recovery of property which had been for a defined time in the hands of a bona fide possessor with iustus titulus, p. 227 supr. In course of time too a prescription was fixed by disconnected legislation for other actions, in particular one of five years for the querella inofficiosi testamenti, Cod. 3. 28. 36. 2: Dig. 5. 2. 8. 17. Actions which fell under the old rule were called perpetuae, those which were limited by any of these periods temporales.

More systematic legislation upon this matter commenced with Constantine, who enacted that all real actions which were not already limited might be repelled by an exceptio unless brought within forty years, Cod. 7. 39. 2, which subsequently seems to have been reduced to thirty, the time here being not utile but continuum. In A. D. 424 Theodosius subjected to this same thirty years' limit all actions whatsoever, with a few exceptions, which had hitherto been perpetuae, Cod. ib. 3. This rule is in force under Justinian, the only actions of importance which are not governed by it being vindicatio in libertatem, Cod. 7. 22. 3, and fiscal claims for unpaid taxes, Cod. 7. 39. 6, which continued perpetual in the old sense; so that in his compilations actio perpetua means an action which is barred by lapse of not less than thirty years.

For the remedies of the bonorum possessor and other praetorian successors who feigned themselves heirs see Gaius iv. 34, 35.

§ 1. A right of action which, though not exercised by the person to whom it originally accrued, may still be exercised by his heir, is said to be actively transmissible; one which, though not exercised against the person originally liable, may still be exercised against his heir, is said to be passively transmissible.

Active transmission, as Justinian remarks, is the rule. Those rights of action only are excepted (of which the actio iniuriarum is here taken as a type) which are grounded not on a damnum or injury to property, but on a grievance or insult to the person; e. g. among others (as a rule)

in heredem non competere, veluti furti, vi bonorum raptorum, iniuriarum, damni iniuriae. sed heredibus huiusmodi actiones competunt nec denegantur, excepta iniuriarum actione et si G. iv. 113. qua alia similis inveniatur. aliquando tamen etiam ex contractu actio contra heredem non competit, cum testator dolose versatus sit et ad heredem eius nihil ex eo dolo pervenerit.

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the querella inofficiosi testamenti, Dig. 5. 2. 6. 2, and the remedy of a patron or pater against a freedman or child who commenced legal proceedings against him without the praetor's permission, Tit. 16. 3 inf. The point of the distinction is well put by Theophilus, *ἔνθα γὰρ τὸ γενόμενον ἁμάρτημα ἐλαττοῖ τὴν τοῦ μέλλοντος τελευτᾶν περιουσίαν, τότε καὶ ὁ κληρονόμος, ὡς συναδικούμενος, τὴν ἀπὸ τοῦ ἁμαρτήματος ἀγωγὴν κινήσει . . . Ἐπειδὴ . . . οὐ μειοῖ τὴν ὑπόστασιν, εἰκότως καὶ ὁ κληρονόμος ὁ ἐμός, ὡς μὴ συναδικηθείς, ταύτην οὐχ ἕξει.*

The chief exceptions to passive transmission are the actiones populares, Dig. 47. 23. 7. 8, and (as is observed in the text) penal actions arising ex delicto. Actions which are purely poenae persecutoriae are passively transmissible only when they are absolutely the only remedy on the wrong (e. g. the actio on calumnia, Dig. 3. 6. 5. pr.), and then only so far as the inheritance has been enriched thereby; and this same principle of the liability of the heir to the extent to which the inheritance has been benefited applies also to actions (1) which, though grounded on delict, are purely rei persecutoriae (e. g. actio doli, Dig. 4. 3. 17. 1, quod metus causa, Dig. 4. 2. 16. 2); (2) which are mixtae, except where an action which is purely rei persecutoria lies on the same delict (e. g. the condictio furtiva on rapina, Dig. 47. 8. 2. 27). Condictio furtiva, not being based on delict, lies against the thief's heir in solidum, Tit. 1. 19 supr., Dig. 13. 1. 7. 2; ib. 9.

The examples given by Gaius (iv. 113) of actions which, though arising ex contractu, are either actively or passively untransmissible, create no difficulty: 'adstipulatoris heres non habet actionem, et sponsoris et fidepromissoris non tenetur'. But Justinian's statement in the text that where a party to a contract has been guilty of dolus his heir is not suable, if he has personally derived no advantage from the fraud, is contradicted by a large number of passages in the Corpus iuris; e. g. Dig. 50. 17. 157. 2 'in contractibus successores ex dolo eorum, quibus successerunt, non tantum in id quod pervenit, verum etiam in solidum tenentur', Dig. 44. 7. 12 (which disproves Theophilus' explanation of this passage by the actio depositi) 'et depositi et commodati et mandati et tutelae et negotiorum gestorum ob dolum malum defuncti heres in solidum tenetur', ib. 49 'ex contractibus venientes actiones in heredes dantur, licet delictum quoque versetur'. It may be that the passage was taken into the text of the Institutes from Gaius without the obsolete example which alone could give it a semblance of truth; but it is better to understand it of cases in which fraud was not remediable by the ordinary action on the contract (i. e. stricti iuris contracts) but only by the actio doli; this being sup-

poenales autem actiones, quas supra diximus, si ab ipsis principalibus personis fuerint contestatae, et heredibus dantur et contra heredes transeunt. **Superest ut** admoneamus, quod 2 G.iv.114.
si ante rem iudicatam is cum quo actum est satisfaciat actori, officio iudicis convenit eum **absolvere**, licet **iudicii accipiendi**

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ported by Dig. 4. 3. 17. 1 'haec actio (doli) in heredem datur . . . de eo quod ad eos pervenit'. Upon this interpretation the expression 'ex contractu actio' of course is loose; all it means is that a delictal action arising from fraud in contractual relations lies in heredem only so far as the inheritance has been enriched by the fraud itself—a principle which has been already stated.

There is no question of transmission when the action has once reached the stage of litis contestatio; from that moment, whatever its character, it bound and entitled the heirs of the defendant and plaintiff respectively in every case.

§ 2. The truth of the dictum 'omnia iudicia absolutoria' esse, which means that even where the defendant is proved to have been in the wrong the trial must end in absolution 'si ante rem iudicatam satisfaciat actori' (Gaius iv. 114), had been disputed by the jurists. The Sabinians had affirmed it in its entirety; the other school admitted it in real and bonae fidei actions, Gaius loc. cit., but from all others they had excluded it as inconsistent with the duty of the iudex as laid down in the formula. In this he was instructed to condemn the defendant if he found that, at the date of litis contestatio, he was bound by the obligation alleged by the plaintiff: si paret . . . condemna. His duty therefore was plain: no occurrence subsequent to litis contestatio could justify him in absolving the defendant if the plaintiff made out his case, not even full satisfaction of the latter's claim before the termination of the action. The only liability of the defendant which could be cancelled by such satisfaction was his liability as it existed before litis contestatio, and that had been already destroyed by the novative operation of litis contestatio itself. Thus the difficulty which the Proculians felt in admitting the maxim in its generality arose entirely from the formula, and consequently with the disappearance of the formula the difficulty disappeared also, and the rule became universal.

A topic treated by Gaius in close connection with the limitation of actions is their Pendency; the question of the duration of actions which have once been commenced by litis contestatio. All actions were for this purpose divided in his time into two classes; those 'quae legitimo iure consistunt', and those 'quae imperio continentur'. The former are supposed by M. Wlassak (followed by Girard, Mélanges de droit Romain, p. 121, note 1) to be those actions in which the lex Aebutia allowed the substitution of trial by formula for trial by legis actio, and they comprise all actions which were tried within the first milestone from Rome by a single iudex who was a Roman citizen, and all the parties to which were citizens also; they were required by the lex Iulia iudiciaria to be

tempore in ea causa fuisset, ut damnari debeat: et hoc est, quod ante vulgo dicebatur, omnia iudicia absolutoria esse.

XIII

DE EXCEPTIONIBUS

G. iv. 115. Sequitur, ut de exceptionibus dispiciamus. comparatae sunt
G. iv. 116. autem exceptiones defendendorum eorum gratia, cum quibus

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adjudged within eighteen months of litis contestatio, though previously they do not seem to have been limited, Cic. pro Quinctio 13 ('et hoc est quod vulgo dicitur, e lege Iulia litem anno et sex mensibus mori' Gaius iv. 104). The latter comprised all actions tried outside the first milestone, and also those tried within it by more than one judge (e. g. by recuperatores) or in which the judge or any party was a peregrinus; they fell to the ground unless judgment was delivered before the magistrate who gave the formula vacated office: 'tamdiu valent, quamdiu is qui ea praecepit imperium habebit' Gaius ib. 105. Where the iudicium was legitimum, in personam, and had an intentio in ius concepta, no subsequent action would lie on the same ground; in all other cases the plaintiff could sue again, but could be repelled by exceptio rei iudicatae or in iudicium deductae, ib. 106, 107. The twenty years' suit spoken of by Martial (7. 65) was probably prolonged to this inordinate length by a series of appeals; suits tried extra ordinem (not being iudicia) were of course not subject to these rules, nor apparently were actions tried in the centumviral court: 'iudicia centumviralia, quibus peragendis vix suffectura litigatorum aetas videbatur' Suetonius, Vesp. 10.

The rules of Pendency described by Gaius went out of use with the formulary procedure. Constantine appears to have put it in the power of a defendant to compel his plaintiff to bring the cause to judgment within two years from its commencement (Cod. Theod. 2. 15), which was extended to three by Justinian, who also introduced a summary procedure enabling a party to put a stop to unreasonable delay on the part of his opponent: 'censemus omnes lites . . . . . , exceptis tantummodo causis quae ad ius fiscale pertinent, vel quae ad publicas respiciunt functiones, non ultra triennii metas post litem contestatam esse protrahendas' Cod. 3. 1. 13. 1. If both parties let an action drop after its commencement, it could be resumed at any moment within forty years: 'quod tempus, id est, quadraginta annorum spatium, ex eo numerari decernimus, ex quo novissima processit cognitio, postquam utraque pars cessavit' Cod. 7. 39. 9. 3.

Tit. XIII. The general nature of exceptiones, and the form which they assumed under the system of formulae, are described in Excursus X inf. Under Justinian the term still denotes the plea by which a defendant who cannot deny the existence of the plaintiff's right of action (ipso iure actionem non habere) argues that it cannot be exercised with effect in consequence of his possessing a countervailing right by which it is balanced: 'exceptio dicta est quasi quaedam exclusio, quae opponi actioni cuiusque

agitur: saepe enim accidit, ut, licet ipsa persecutio qua actor experitur iusta sit, tamen **iniqua sit** adversus eum cum quo agitur. Verbi gratia si metu coactus aut dolo inductus aut 1

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rei solet ad excludendum id quod in intentionem condemnationemve deductum est' Dig. 44. 1. 2. pr. But, besides losing its old formal or processual meaning as an element in the formula, even the old material signification of the term, as a plea in defence of a countervailing right, has now become less prominent owing to a new distinction which has arisen between defences which relate to the procedure, and defences which rather meet the plaintiff's case upon its merits. Among the former are objections touching the competence or impartiality of the court, the person of the plaintiff (e. g. exceptio procuratoria), the form of the action, and the exceptio praeiudicii. These must be advanced and argued before litis contestatio, the opening of the case by narratio and contradictio, for if they are shown to be well grounded the action cannot proceed. Defences of the second class, whether they directly traverse the plaintiff's contention, or merely allege a countervailing right in the defendant, need not be advanced till litis contestatio; the result of this being that the term exceptio is sometimes improperly used to denote what is really an absolute denial of the plaintiff's right; e. g. exceptio longi temporis after ten or twenty years' bona fide possession by a defendant with iustus titulus.

Dilatory exceptions (§ 10 inf.) belonging to this latter class of defences must always be advanced at the litis contestatio, and any attempt to bring them forward for the first time at a later stage of the proceedings were punished by a fine inflicted on the counsel; but no evidence need be given in their support till the plaintiff has proved his own case: 'exceptionem dilatoriam opponi quidem initio, probari vero postquam actor monstraverit quod asseverat oportet' Cod. 4. 19. 19. For the general procedure see § 10 inf. and notes.

Peremptory exceptions (§ 9 inf.) also as a rule are advanced in the contradictio, at the opening of the case, and similarly need not be proved till the plaintiff has established his own contention, Cod. 7. 33. 9; but the defendant may always bring them forward later, and may even allege them for the first time on appeal: 'si quid autem in agendo negotio minus se allegasse litigator crediderit, quod in iudicio acto fuerit omissum apud eum qui de appellatione cognoscit persequatur' Cod. 7. 62. 6. 1.

§ 1. For the introduction of the exceptio quod metus causa by the praetor Octavius see on Tit. 6. 33 supr. A person who had been induced by intimidation to make any disposition (and not merely a contract, as might hastily be inferred from the text; see Gaius iv. 117) could either bring the actio quod metus causa (Tit. 6. 27 supr.) by which he might recover penal damages for any loss he had suffered, or he could repel any action brought against him on the disposition by the exceptio (which, however, was not necessary in bonae fidei actions, Cod. 4. 44. 8), or finally he might get himself in integrum restitutus. With 'palam est iure civili te obligatum esse' in the text we may compare Dig. 4. 2. 21. 'si

errore lapsus stipulanti Titio promisisti, quod non debueras promittere, palam est iure civili te obligatum esse et actio, qua intenditur dare te oportere, efficax est: sed iniquum est te condemnari ideoque datur tibi exceptio metus causa aut doli mali aut in factum composita ad impugnandam actionem.
2 Idem iuris est, **si quis** quasi **credendi causa pecuniam stipu-**
G. iv. 116[a]. **latus fuerit neque numeravit. nam eam pecuniam a te petere posse eum certum est: dare enim te oportet, cum ex stipulatu tenearis: sed quia iniquum est eo nomine te condemnari, placet exceptione** pecuniae non numeratae **te defendi debere,**

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metu coactus adii hereditatem, puto heredem me effici, quamvis si liberum esset noluissem, tamen coactus volui'.

What has been said of metus may, mutatis mutandis, be repeated of dolus; see the note on Tit. 6. 33 referred to. Here the fraud had to be alleged specifically against the plaintiff in the exceptio; 'et quidem illud adnotandum est, quod specialiter exprimendum est, de cuius dolo quis queratur, non in rem, "si in ea re nihil dolo malo factum est," sed sic "si in ea re nihil dolo malo actoris factum est"' Dig. 44. 4. 2. 1; cf. (of the actio doli) 'in haec actione designari oportet cuius dolo factum sit, quamvis in metu non sit necesse' Dig. 4. 3. 15. 3. Where to 'nihil dolo malo factum est' was added 'neque fiat' (as in Gaius iv. 119) the exceptio was said to be generalis.

If the defendant's plea was not one of the commoner kinds which had received specific names, it briefly stated the facts upon which he relied, and was then said to be in factum composita: 'in factum λέγεται ἐπειδὴ διηγηματικῶς τὸ γενόμενον ἀντιτίθησιν' Theophilus; so, too, Gaius describes formulae in factum conceptae by saying 'nominato eo quod factum est' iv. 46; for an example see Fragm. Vat. 310 'si non donationis causa mancipavi vel promisi me daturum'. In a loose sort of way these exceptiones in factum were comprised under the exceptio doli: 'generaliter sciendum est ex omnibus in factum exceptionibus doli oriri exceptionem, quia dolo facit, quicunque id quod quaqua exceptione elidi potest petit' Dig. 44. 4. 2. 5. It may be, however, that the contrast is merely the old one between in ius and in factum, the judge's attention being directed in some exceptiones to a question merely of law (e. g. 'si in ea re nihil contra legem Cinciam factum sit' Fragm. Vat. 310); this, as Keller remarks (Civil Process § 35), would make most exceptions in factum.

§ 2. The appropriate defence in this case is said by Gaius (iv. 116) to be the exceptio doli. If the transaction had purported to be a mere mutuum, not a stipulatio, no exceptio would have been necessary; the plaintiff's right to recover lay only upon the assumption that the money had actually been advanced, so that the defendant would simply stand by and require him to prove it, for otherwise he could not show '(reum) dare oportere'; his defence was a direct traverse of the plaintiff's case. For

cuius tempora nos, secundum quod iam superioribus libris scriptum est, constitutione nostra coartavimus. Praeterea 3
debitor **si pactus fuerit** cum creditore, **ne a se peteretur, nihilo** G. iv. 116[b].
minus obligatus manet, **quia pacto convento obligationes non** omnimodo dissolvuntur: qua de causa efficax est adversus eum actio, qua actor intendit 'si paret eum dare oportere. sed quia iniquum est contra pactionem eum damnari, defenditur **per exceptionem pacti conventi.** Aeque si debitor 4
deferente creditore iuraverit nihil se dare oportere, adhuc obligatus permanet, sed quia iniquum est de periurio quaeri, defenditur per exceptionem iurisiurandi. **in his quoque ac-** G. iv. 117.
tionibus, quibus in rem agitur, aeque necessariae sunt **exceptiones : veluti si** petitore deferente possessor iuraverit eam rem suam esse et nihilo minus eandem rem petitor vindicet: licet enim verum sit quod intendit, id est rem eius esse, iniquum est tamen possessorem condemnari. Item si iudicio 5

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the whole subject see pp. 496, 497 supr., and for the practice of accompanying mutua with a stipulation for repayment cf. Corn. Nepos, Att. 9, Dig. 12. 1. 30; 46. 2. 6. 1; ib. 7.

§ 3. For pactum de non petendo, and qualifications of the rule 'pacto convento obligationes non omnimodo dissolvuntur' see p. 469 supr. The form of the exceptio in the formulary period was 'si non convenit ne ea pecunia peteretur'.

§ 4. See Tit. 6. 11 supr. and notes. In Dig. 12. 2. 2 the oath is spoken of as having even greater weight than the judgment of a court of law; 'maioremque habet auctoritatem quam res iudicata'. The obligation which remained after the debtor had denied his liability on oath (adhuc obligatus manet) was civil only; the natural obligation was destroyed, Dig. 46. 3. 95. 4; for the oath being an institution of natural law it is 'iniquum de periurio quaeri'; in the next paragraph, where he is speaking of the exceptio rei iudicatae, Justinian does not use the word iniquum, for res iudicata is iuris civilis. For the employment of exceptions generally in real actions cf. Gaius iv. 117, and for this special case Dig. 12. 2. 3. 1 'quacunque actione quis conveniatur, si iuraverit, proficiat ei iusiurandum, sive in personam sive in rem agatur'.

§ 5. Under the legis actio procedure a second action could never be brought on the same ground: 'qua de re semel actum erat, de ea postea ipso iure agi non poterat' Gaius iv. 108; a rule which in the formulary period was almost entirely reversed; see note on Pendency pp. 591, 592 supr.; Gaius iii. 181; iv. 106, 107. In the latter's time a defendant in any action (putting aside iudicia legitima in personam with an intentio in ius concepta, in which the right of action was consumed ipso iure) could, after the lis had once been contestata, protect himself against further litigation

tecum actum fuerit sive in rem sive in personam, nihilo minus obligatio durat et ideo ipso iure postea de eadem re adversus

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on the same ground by exceptio rei in iudicium deductae, and after judgment by exceptio rei iudicatae. The first of these is no longer found under Justinian, as litis contestatio had lost its novative effect of destroying the right of action. With the disappearance, too, of the distinction between iudicia legitima and those quae imperio continentur the rule has become universal that technically there is nothing to prevent the commencement of an action upon a ground which has been already adjudicated upon; the exceptio rei iudicatae remains in full operation; 'obstat, quotiens inter easdem personas eadem quaestio revocatur' Dig. 44. 2. 3; ib. 7. 4. Its operation now, however, is never unjust, as it must often have been in the formulary period, when it protected a defendant with equal force whether the ground upon which he had been absolved was merely technical, or one of substantial justice; whether he was absolved because he had already paid the money for which he was sued, or because the plaintiff had carelessly brought his action a day before the money really fell due, was immaterial; the plea of res iudicata or in iudicium deducta was equally available. Now, however, as is remarked by Mr. Poste (Gaius p. 550), its rules 'are more flexible than the hard and fast doctrine of necessary novation by sententia lata', for now it is allowed to prevent a second action only so far as this is irreconcileable with the objective grounds upon which the previous suit was decided, and, therefore, the mere fact of pleading it does not disarm the plaintiff; it has to be shown that the reason why the previous action was decided against the plaintiff would operate now (e. g. A sues B for money before it is actually due, and B is acquitted. When the money has actually fallen due, A renews his action; a plea by B of res iudicata will not help him, for the ground of the previous decision, which the court will now examine, was not that the money absolutely was not owed, but that it was not owed *then*). In fact, under Justinian, 'suitors were merely restrained, in accordance with the real object of the institution, from harassing their opponents with renewed litigation on the precise questions that had once been adequately decided' Poste's Gaius loc. cit.

More precisely, the conditions under which the exceptio rei iudicatae is an effective defence are the two pointed out in the passage cited above from Dig. 44. 2. 3. (1) The right asserted in the second action must be the same as that asserted in the first. For instance, the res has not been iudicata, because the quaestio is not eadem, if what was decided in the first suit was a question of possession, while in the second we have a question of ownership, Dig. 44. 2. 14. 3, or where an iter is claimed in one action, and an actus in a second, Dig. ib. 11. 6. But, granted that the right alleged is the same, it is immaterial that the second action is of a different nature from the first: 'de eadem re agere videtur et qui non eadem actione agit, qua ab initio agebat, sed etiam si alia experiatur, de eadem tamen re' Dig. ib. 5. For examples of difference of actions involving the same right cf. Dig. 44. 2. 7 (hereditatis petitio and vindicatio); ib. 8

te agi potest: sed debes per exceptionem rei iudicatae adiuvari. Haec exempli causa rettulisse sufficiet. alioquin quam 6

(hereditatis petitio and actio familiae erciscundae); ib. 24 (vindicatio and actio Publiciana). Granted, again, that the right alleged is the same, it is immaterial that in the first action a point was decided incidentally only which forms the principal question in the second, though by the praescriptio praeiudicii or exceptio praeiudicialis (Cic. de Invent. 2. 20) the defendant was enabled to postpone such incidental determination of an issue which was all important in another suit.

It is often said that the identity of the object to which the right in either action relates is an essential condition of exceptio rei iudicatae; e.g. 'cum quaeritur, haec exceptio noceat necne? inspiciendum est an idem corpus sit' Dig. 44. 2. 12; but, though it may usually be inferred that the quaestio is eadem from the identity of the res, it is really immaterial that the res are different if the right is substantially identical in the two actions; e. g. if a plaintiff demands first the whole, and later a part of that whole, Dig. ib. 7 pr., or if he claims first an ancilla praegnas, and then a child conceived by her after litis contestatio in that action, ib. 7. 1, the exceptio can be pleaded with effect.

If the right alleged in the two actions is the same, but is based, in the second, upon a different title from that affirmed in the first, a distinction must be drawn between real and personal actions. If the action was real, the defendant was not estopped from pleading the exceptio by the difference of title, for the right is the same however it may have been acquired: 'neque enim amplius quam semel res mea esse potest'; and consequently 'omnes causae (titles) una petitione apprehenduntur' Dig. 44. 2. 14. 2. The only exception to this rule under the older law was where the title advanced in the second had accrued since the decision in the first action (causa superveniens); later it seems to have been allowable to specify a single title in a real action (causa expressa agere), the plaintiff thereby being held to save his right of subsequently claiming the same property by a different one, Dig. 44. 2. 11. 2; ib. 14. 2. But in obligations the plaintiff's right differs with the mode in which the particular obligation arose: 'actiones in personam ab actionibus in rem hoc differunt, quod cum eadem res ab eodem mihi debeatur, singulas obligationes singulae causae sequuntur, nec ulla earum alterius petitione vitiatur' Dig. ib. 14. 2; e.g. 'si is qui Stichum dari stipulatus fuerat heres exstiterit ei, cui ex testamento idem Stichus debebatur, si ex testamento Stichum petierit, non consumet stipulationem, et contra si ex stipulatu Stichum petierit, actionem ex testamento salvam habebit, quia initio ita constiterint hae duae obligationes, ut altera in iudicium deducta altera nihilominus integra maneret' Dig. 44. 7. 18.

(2) The parties in the second must be the same as in the first action ('inter *easdem* personas' Dig. 44. 2. 3). In Justinian's time, however, this rule had been somewhat modified. A defendant could plead the exceptio if he had previously been sued on the same ground by an agent of the present plaintiff: 'hoc iure utimur, ut ex parte actoris in exceptione rei iudicatae hae personae continerentur, quae rem in iudicium deducant.

ex multis variisque causis exceptiones necessariae sint, ex latioribus digestorum seu pandectarum libris intellegi potest.
G. iv. 118. 7 Quarum quaedam **ex legibus vel ex his, quae legis vicem optinent,** vel ex ipsius **praetoris iurisdictione** substantiam
G. iv. 120. 8 capiunt. **Appellantur autem exceptiones** aliae perpetuae et
G. iv. 121. 9 **peremptoriae,** aliae temporales et **dilatoriae.** Perpetuae et **peremptoriae sunt, quae** semper agentibus obstant et semper

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Inter hos erunt procurator, cui mandatum est, tutor, curator furiosi vel pupilli, actor municipum; ex persona autem rei etiam defensor numerabitur, quia adversus defensorem qui agit litem in iudicium deducit' Dig. 44. 2. 11. 7; for the earlier law see note on Tit. 10 pr. supr. A party was also identified with those whom he had succeeded either universally or singularly, Dig. 44. 2. 9. 2; ib. 11. 3, with those who owned jointly with him land subject or entitled to a praedial servitude (though only in relation thereto) Dig. 8. 5. 4. 3 and 4, and with his correi, Dig. 12. 2. 28. 3. So, too, if in an action between the testamentary and intestate heirs of a deceased person the will was declared void or valid, the judgment bound the legatees and creditors, Dig. 20. 1. 3 pr.; 30. 5. 1; and, as a rule, all persons were bound by decisions on questions of status, so that (e. g.) if A was found to be B's son by a praeiudicium, all persons had to recognize him as the brother of B's other children, whether the finding was right or not, Dig. 25. 3. 1–3.

§ 7. Exceptiones might arise from any of the sources by which rights in general were conferred, for as a statute, a senatusconsult, or the edict could create rights, they could also, ex vi termini, create the right to an exceptio; but in form they may be said to be all praetorian, as it was the praetor who enabled them to be advanced through the formula, and in the legis actio period they were unknown, Gaius iv. 108. Among those based on statutes are the exceptio legis Cinciae, p. 234 supr., Fragm. Vat. 310, legis Plaetoriae, and legis Iuliae (de bonorum cessione); on senatusconsulta the exceptiones SC^i^. Trebelliani, Dig. 15. 2. 1. 8; SC^i^. Macedoniani, and SC^i^. Velleiani; on imperial enactment, the exceptio by which under the epistola Hadriani the fideiussor claimed the beneficium divisionis, p. 426 supr. Those which are purely praetorian form a large portion of the machinery by which the praetor enabled equity to overcome the hardship and injustice of the ius civile; e. g. the exceptiones doli, metus, pacti, rei iudicatae, and in factum; but sometimes a praetorian action is repelled by a 'civil' exception; e. g. the actio hypothecaria or constitutoria by exceptio SC^i^. Velleiani, Dig. 16. 1. 8 pr.; ib. 29 pr.

§ 8. In drawing this distinction Justinian would have done well to follow Gaius, who does not (iv. 120) use the alternative terms temporales and perpetuae; for, as Mr. Poste points out, in Cod. 5. 12. 30. 2 and elsewhere 'temporalis exceptio' denotes the plea of prescription (longi temporis exceptio) which was perpetual and peremptory.

§ 9. For the exceptiones doli and quod metus causa see note on p. 565 supr., for the exceptio pacti note on p. 469 supr.

rem de qua agitur peremunt: qualis est exceptio **doli mali** et **quod metus causa factum est** et **pacti conventi,** cum ita convenerit, **ne omnino pecunia peteretur.** Temporales atque 10
dilatoriae sunt, quae ad tempus nocent et temporis dilationem G. iv. 122.
tribuunt: qualis est **pacti conventi,** cum convenerit, **ne intra** certum tempus **ageretur,** veluti **intra quinquennium. nam finito eo tempore non** impeditur actor rem exsequi. ergo hi,
quibus intra tempus agere volentibus **obicitur exceptio** aut G. iv. 123.
pacti conventi aut alia similis, **differre** debent **actionem** et post tempus agere: ideo enim et dilatoriae istae exceptiones appellantur. **alioquin, si** intra tempus **egerint obiectaque sit exceptio,** neque eo iudicio quidquam consequerentur propter exceptionem **nec post tempus** olim agere poterant, cum temere rem in iudicium deducebant et consumebant, qua ratione rem amittebant. hodie autem non ita stricte haec procedere volumus, sed eum, qui ante tempus pactionis vel obligationis litem inferre ausus est, Zenonianae constitutioni subiacere censemus, quam sacratissimus legislator de his qui tempore plus petierunt protulit, ut et indutias, quas, si ipse actor sponte indulserit vel natura actionis continet, contempserat, in duplum habeant hi, qui talem iniuriam passi sunt, et post eas finitas non aliter litem suscipiant, nisi omnes expensas litis antea acceperint, ut actores tali poena perterriti tempora litium doceantur observare. Praeterea **etiam ex persona dila-** 11 G. iv.
toriae sunt exceptiones: quales sunt procuratoriae, **veluti si** 124.

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§ 10. The enactment of Zeno referred to (Cod. 3. 10. 1) has been already explained, Tit. 6. 33 supr. and notes. Under Justinian, when a defendant had proved his dilatory exception, he was not absolutely acquitted; the judge's sententia (which modern writers call absolutio ab instantia as contrasted with absolutio ab actione) was that at that time he did not owe the plaintiff what had been demanded from him, and the latter could renew his action when the obstacle was removed, though he had to wait twice as long as would otherwise have been necessary, pay all the plaintiff's costs hitherto incurred, and in the meanwhile could claim no interest on the debt. As appears from the text (ante tempus pactionis vel obligationis) the procedure was the same whether the obligation was originally ex die, or payment was postponed subsequently by a 'pactum de non petendo intra certum tempus'. Among dilatory pleas 'quae ad tempus nocent' were in Gaius' time (iv. 122) the exceptiones litis dividuae and litis residuae.

§ 11. Gaius exemplifies exceptiones ex persona dilatoriae (iv. 124) by

per militem aut mulierem agere quis velit: nam militibus nec pro patre vel matre vel uxore nec ex sacro rescripto procuratorio nomine experiri conceditur: suis vero negotiis superesse sine offensa disciplinae possunt. eas vero exceptiones, quae olim procuratoribus propter infamiam vel dantis vel ipsius procuratoris opponebantur, cum in iudiciis frequentari nullo perspeximus modo, conquiescere sancimus, ne, dum de his altercatur, ipsius negotii disceptatio proteletur.

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the plea that the plaintiff was suing by a cognitor when the edict disqualified him from being so represented, or had appointed as his cognitor a person similarly disabled from acting in that capacity; he does not mention the exceptio procuratoria, though infames were disabled from both representing others and being themselves represented in that form, Fragm. Vat. 322. For infamia generally see on Tit. 16. 2 inf. Justinian's enactment in the last lines of the paragraph seems merely to have formally deprived defendants of a right which they had practically ceased to exercise, and not to have affected the disability of infames to appoint or appear as procurators; the judge could still reject an agent because either he could not act as such, or the true party could not be so represented, but the defendant could not.

Women could not be procurators on the principle of the SC. Velleianum, that all interventio was a virile munus. By Cod. 2. 13. 25 state officials of higher rank were ordered to conduct their suits by agents, lest by appearing personally they should disturb the impartiality of the court.

As a general rule exceptions are not subject to limitation, for a defendant cannot advance them when he will, but must wait till he is sued: 'cum actor quidem in sua postestate habeat, quando utatur suo iure, is autem, cum quo agitur, non habet potestatem quando conveniatur' Dig. 44. 4. 5. 6. When, however, a party can assert his right by either action or exception (as e. g. in dolus and metus), it is held by some writers that he loses the latter in the same period of limitation as he loses the former, by others that even here the exception is indestructible; whence the two opposed maxims, 'tant dure l'action, tant dure l'exception',—'quae ad agendum sunt temporalia, ad excipiendum sunt perpetua.' The truth seems to be that if the right upon which both action and exception rest is in rem, the latter continues to exist even after the former is barred, because the real right itself is not affected by the prescription; but if they both have their source in an obligation, the obligation itself is in effect extinguished by the prescription of the action (Dig. 46. 1. 37; 13. 5. 18. 1), and therefore the exception expires as well; cf. Dig. 12. 2. 9. 4.

XIV

DE REPLICATIONIBUS

Interdum evenit, ut exceptio, quae prima facie iusta videatur, inique noceat. quod cum accidit, alia allegatione opus est adiuvandi actoris gratia, quae replicatio vocatur, quia per eam replicatur atque resolvitur vis exceptionis. veluti cum pactus est aliquis cum debitore suo, ne ab eo pecuniam petat, deinde postea in contrarium pacti sunt, id est ut petere creditori liceat: si agat creditor et excipiat debitor, ut ita demum condemnetur, si non convenerit, ne eam pecuniam creditor petat, nocet ei exceptio, convenit enim ita: namque nihilo minus hoc verum manet, licet postea in contrarium pacti sunt. sed quia iniquum est creditorem excludi, replicatio ei dabitur ex posteriore pacto convento. G. iv. 126.
1 Rursus interdum evenit, ut replicatio, quae prima facie iusta sit, inique noceat. quod cum accidit, alia allegatione opus est adiuvandi rei gratia, quae duplicatio vocatur. G.iv.127.
2 Et si rursus ea prima facie iusta videatur, sed propter aliquam causam inique actori noceat, rursus allegatione alia opus est, qua actor adiuvetur, quae dicitur triplicatio. G.iv.128.
3 Quarum omnium exceptionum usum interdum ulterius quam diximus varietas negotiorum introducit: quas omnes apertius ex latiore digestorum volumine facile est cognoscere. G.iv.129.
4 Exceptiones autem,

Tit. XIV. For the nature of duplicatio, replicatio, &c., and the form which they assumed under the system of formulae see the reference in the General Index to Excursus X inf. Gaius (iv. 126) further exemplifies duplicatio by an action brought for the price of goods sold to which the defendant pleads an exceptio that as they have not yet been delivered he ought not to be condemned, and is met by the plaintiff's duplicatio that the sale was made upon condition that there should be no delivery until the price had been paid. For other illustrations see Dig. 3. 3. 48; 16. 1. 32. 2; 50. 17. 154.

§ 3. The use of exceptio here for duplicatio, replicatio, &c., is justified by Dig. 44. 1. 2. 1 'replicationes (a term employed by Ulpian and Iulianus instead of duplicatio) nihil aliud sunt, quam exceptiones a parte actoris, quae exceptiones excludunt', ib. 22 'replicatio est contraria exceptio, quasi exceptionis exceptio'.

§ 4. See on Bk. iii. 20. 6 supr. The expression in the text (*plerumque* accommodari solent) is more correct than that in Dig. 44. 1. 19 '*omnes*

quibus debitor defenditur, plerumque accommodari solent etiam fideiussoribus eius: et recte, quia, quod ab his petitur, id ab ipso debitore peti videtur, quia mandati iudicio redditurus est eis, quod hi pro eo solverint. qua ratione et si de non petenda pecunia pactus quis cum reo fuerit, placuit proinde succurrendum esse per exceptionem pacti conventi illis quoque qui pro eo obligati essent, ac si et cum ipsis pactus esset, ne ab eis ea pecunia peteretur. sane quaedam exceptiones non solent his accommodari. ecce enim debitor si bonis suis cesserit et cum eo creditor experiatur, defenditur per exceptionem 'nisi bonis cesserit': sed haec exceptio fideiussoribus non datur, scilicet ideo quia, qui alios pro debitore obligat, hoc maxime prospicit, ut, cum facultatibus lapsus fuerit debitor, possit ab his quos pro eo obligavit suum consequi.

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exceptiones, quae reo competunt, fideiussori quoque, etiam invito reo, competunt'.

Some exceptiones are said rei, others personae cohaerere: the latter (e.g. those beneficii competentiae and pacti de non petendo in personam) avail only to the person immediately concerned; the former, which are the greater number, can be used by other persons also who can be sued in lieu of or in addition to the one immediately liable, e. g. his heirs or sureties: 'exceptiones quae personae cuiusque cohaerent non transeunt ad alios, veluti ea, quam socius habet exceptionem, quod facere possit, vel parens patronusve (Tit. 6. 38 supr.), non competit fideiussori . . . . . rei autem cohaerentes exceptiones etiam fideiussori competunt, ut rei iudicatae, doli mali, iurisiurandi, quod metus causa factum est. Igitur et si reus pactus sit in rem, omnimodo competit exceptio fideiussori: intercessionis quoque exceptio, item quod libertatis onerandae causa petitur, etiam fideiussori competit' Dig. 44. 1. 7.

It is on the principle stated in the text (quia qui alios . . . . suum consequi) that the surety remains liable when his principal has died without leaving any successor, Dig. 16. 3. 1. 14; 46. 3. 95. 1, or has undergone capitis deminutio maxima, Dig. 2. 8. 5 pr.; and similarly the answer to the question, whether a surety, when sued, can defend himself by pleading that his principal has been in integrum restitutus, depends upon the object for which the creditor obtained the guaranty; e. g. if the principal debtor is a minor, and the very object for which the creditor took the surety was to protect himself against his restitutio 'propter minorem aetatem', the surety cannot plead the exceptio: 'si, cum scirem minorem, et ei fidem non haberem, tu fideiusseris pro eo, non est aequum fideiussori subveniri' Dig. 4. 4. 13 pr.

A surety cannot be deprived of any exceptio to which he has once

XV

DE INTERDICTIS

Sequitur, ut dispiciamus de interdictis seu actionibus, quae pro his exercentur. erant autem interdicta formae atque G. iv. 138.

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acquired a right by any unilateral act of his principal: 'sed verius est, semel adquisitam fideiussori pacti exceptionem ulterius ei invito extorqueri non posse' Dig. 2. 14. 62.

An exceptio in rem is one which can be pleaded against any one who can sue on a given ground of action: an exceptio in personam is one which can be advanced only against a determinate person or persons; e. g. the exceptio doli, and sometimes that based on a pactum de non petendo, as where one of two or more correi credendi promises not to sue the debtor.

Tit. XV. The term interdictum in origin means little more than edictum. The legis actiones could not be employed for the prevention of anticipated wrong, or for the punishment of actual breaches of the peace; these were matters to be dealt with by the imperium of the magistrate (consul or praetor), who upon application made would issue an injunction (interdictum) or order (decretum), disobedience to which, unless justified, would be punished by imprisonment, fine, or other ordinary means at his disposal for enforcing compliance with his command.

The chief purposes for which such interdicta were issued were the prevention and punishment of offences against loca sacra and publica (Dig. 43. 1. 1 pr.), and the protection of Possession as distinct from Ownership: 'in legitimis actionibus nemo ex iure Quiritium possessionem suam vocare audet, sed ad interdictum venit, ut praetor his verbis utatur; uti nunc possidetis', etc. Festus, s.v. Possessio. Thus some of them fall within the sphere of public, others within that of private, law; their chief characteristic however in this period is, that they are a class of remedies standing altogether outside and apart from the ordinary method of redress by legis actio, the procedure of which was inapplicable to them.

Under the formulary system interdicts still continued to be issued in relation to the same matters, especially possession, as before, but their breach was no longer tried or punished in the old manner; they were brought into connection with the ordinary procedure by iudex and formula, and became merely a peculiar mode of commencing an ordinary action or congeries of ordinary actions. The praetor, on a party's application, issued the interdict, by which 'iubebat aliquid fieri aut fieri prohibebat'. Usually this was disregarded by the person to whom it was addressed as a matter of course (Gaius iv. 141); whereupon the latter was brought before the magistrate by the plaintiff, and the matter took the form of an action in which the question for decision was in effect whether, in defying the interdict, the defendant had really broken the law.

G. iv. 139. **conceptiones verborum,** quibus praetor aut iubebat **aliquid fieri aut fieri** prohibebat. **quod tum maxime** faciebat, **cum**

Interdicts which demanded production or restitution of property (§ 1) could be tried either by formula arbitraria or per sponsionem at the defendant's option, Gaius iv. 162–165; the latter procedure involved a penal wager of considerable amount, and consequently would perhaps be preferred by a defendant who was convinced of the justice of his cause. In interdicta prohibitoria there was no alternative; the trial must be per sponsionem, and, where the interdict was double (Gaius iv. 160, § 7 inf.), was peculiarly complicated, because each party played the *rôle* of both plaintiff and defendant, 'nec quisquam praecipue reus vel actor intellegitur, sed unusquisque tam rei quam actoris partes sustinet; quippe praetor pari sermone cum utroque loquitur' Gaius loc. cit. The procedure upon a double is in fact a duplication of that upon a single interdict when tried per sponsionem, with one peculiar feature (the fructus licitatio) of its own. The circumstances under which a double interdict lay were where two persons claimed each to be entitled to the exclusive present possession of the same object, moveable or immoveable. Here, on their appearance before him, the praetor awarded the possession, on a rough and ready principle, to one or other of them; if the object was immoveable, and the interdict was uti possidetis, to the one who as a matter of fact was in possession 'nec vi nec clam nec precario' at that moment; if it was moveable, and the interdict was utrubi, to the one who had been in possession the greater part of the year next immediately preceding, Gaius iv. 148–152: cf. § 4 inf. This award was immediately followed by the issue of the interdict proper, which prohibited all disturbance of the possession so adjudged, Gaius iv. 160.

It is clear that this adjudication might be altogether at variance with the true rights of the case, and it was to try the true rights of the case—to determine which of the parties was really entitled to the possession in law—that all the proceedings had in reality been taken. Possibly it may have been hoped in the earlier time that the order would be obeyed (Gaius iv. 139), and had this been so interdicts would have formed a typical illustration of a summary process. But, as a matter of fact, the issue of the interdict was almost invariably followed at once by a fictitious dispossession or ejectment (vis ex conventu), which was a formal breach of the praetor's order; the party so disturbed brought the other at once again before the magistrate, and here, in iure, the proper steps were taken for getting the real question at issue between them decided by action.

The first of these was to determine which of them should have possession of the object in dispute pending litigation, and this was done by putting such interim possession up to auction between them (fructus licitatio): the one who bid the highest sum obtained it, subject to the condition of paying that amount to the other, in case he lost the suit, as liquidated damages for having been in possession of property to which he had no

de possessione aut quasi possessione inter aliquos contendebatur.

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right during the continuance of the action. Payment of this was secured by a ' fructuaria stipulatio ', upon which the other could sue by condictio ; or, as an alternative, he could bring a ' iudicium fructuarium ' on the fructus licitatio itself.

So far provision had been made only for compensating the party who was out of possession for the loss which he sustained in being deprived of it pending litigation, supposing he could prove that of right it belonged to him. For recovering the possession itself he had a iudicium secutorium or Cascellianum, which was an actio arbitraria, enabling the judge to condemn the party in possession to pay the value of the property in dispute in default of restitution, Gaius iv. 165, 166.

None of these proceedings, however, provided for the trial of the real question at issue : they presupposed its decision in favour of the lower bidder at the fructus licitatio, and were designed to enable him in that event to recover the possession and damages for having been awhile deprived of it. The real question—which of the parties was, at the issue of the interdict, entitled in law to the possession (Gaius iv. 166)—was brought to trial in the form of an action on a wager, or rather on two wagers, as each party played a double *rôle*. Now in Roman law a wager or a bet could be made only by two stipulations, each of which was ground for an independent action : the first party promised the second so much, if he turned out to be in the wrong ; and then the second promised the first the same sum in the contrary event. Thus the double interdict, involving two wagers, involved four stipulations and four condictiones certi upon them ; and formulae were delivered to the iudex for the simultaneous trial of six actions, viz. (*a*) four condictiones certi on the two wagers ; (*b*) a fifth condictio certi on the fructuaria stipulatio (or, as alternative, the iudicium fructuarium) ; and (*c*) an actio arbitraria, the iudicium secutorium. If the iudex found in favour of the highest bidder at the fructus licitatio, he absolved him on (*b*), (*c*), and the two wager-condictions in which he was defendant, and condemned the other in the two wager-condictions in which he was plaintiff ; if he found against him, he condemned him to pay the two wagers, the sum of the fructuaria stipulatio, and the value of the property in default of restitution ; the other party he absolved altogether ; Gaius iv. 167, 168.

With the disappearance of the formulary system this complicated procedure necessarily passed away ; its very complication depended on the formula. Justinian tells us himself (§ 8 inf.) that in his day interdicts (stricto sensu) were no longer issued : in the opening paragraph of the Title he speaks of interdicts ' seu actionibus quae pro his exercentur ', with which may be compared the Title of Dig. 43. 1 ' de interdictis sive extraordinariis actionibus quae pro his competunt '. An interdict, in his time, may fairly be described as the trial by ordinary action, commenced in the ordinary way, of questions which in the formulary

G.iv.142.1 Summa autem **divisio** interdictorum haec **est, quod aut prohibitoria sunt aut restitutoria aut exhibitoria.** prohibitoria sunt, quibus vetat aliquid fieri, veluti vim sine vitio possidenti, vel mortuum inferenti, quo ei ius erit inferendi, vel

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period would have been tried in the complicated mode described by Gaius, and more particularly of questions relating to possession—'interdicta autem licet in extraordinariis iudiciis proprie locum non habent, tamen ad exemplum eorum res agitur' Cod. 8. 1. 3. The only features of difference between them and an ordinary action are to be explained by supposing that the questions on which they lay were thought to deserve a somewhat more summary trial than others: hence the directions in the Code (e. g. 8. 1. 4; 8. 2. 3; 8. 4. 8; 11. 47. 14) to judges to try interdicts with all possible despatch, and the rule that the operation of a decision on the interdict unde vi (which may be taken as a type of the rest) shall not be suspended by appeal; Cod. 7. 69.

In qualification of Justinian's description of interdicts under the earlier system as 'formae atque conceptiones verborum', it may be observed that all orders of the praetor, like the sententia of a iudex, Cod. 7. 44. 1, had to be orally delivered, though the interdict, being as a rule extremely precise and technical, was committed to a written form, breviculum or periculum, apparently as early as Cicero (in Verrem iii. 79). There may also be a reference to the termination of interdicts (stricto sensu) in a regular action instituted by formula ('concepta verba, id est per formulas' Gaius iv. 30): cf. Gaius iv. 141; Dig. 25. 5. 1. 2; 44. 7. 37 pr.

The following sections are concerned in the main with possessory interdicts. In § 1 some are specified which relate to Public Law: others protect personal freedom (interdictum 'de homine libero exhibendo' Dig. 43. 29), family rights ('de liberis exhibendis et ducendis' Dig. 43. 30), and rights of property ('de arboribus caedendis, de glande legenda' Dig. 43. 27 and 28); and finally, some were designed to 'sanction' the praetor's exercise of his own imperium: e. g. the interdicta 'ne vis fiat ei qui in possessionem missus erit' Dig. 43. 4, fraudatorium, possessorium Gaius iv. 145, and sectorium ib. 146.

For iuris quasi possessio cf. pp. 218, 333 supr., and for interdicts relating to it see Dig. 43. 18 (de superficiebus), 19 (de itinere actuque privato), and the other Titles to 23 of the same book.

§ 1. Of course this whole classification of interdicts as prohibitoria, restitutoria, and exhibitoria, being based upon the tenor of the praetor's order, and derived from Gaius (iv. 140, 142), is in Justinian a mere anachronism: interdicts aim at prevention, restitution, and production, no more, and no less, than ordinary actions. In Dig. 43. 1. 1. 1 Ulpian adds a fourth species—interdicts which are mixed—i. e. both prohibitoria and exhibitoria.

The interdict forbidding violent ouster of an innocent possessor is that known as uti possidetis, § 4 inf. That de mortuo inferendo is treated in detail in Dig. 11. 8; its formula ran 'quo quave illi mortuum inferre

in loco sacro aedificari, vel in flumine publico ripave eius aliquid fieri, quo peius navigetur. restitutoria sunt, quibus restitui aliquid iubet, veluti cum bonorum possessori possessionem eorum, quae quis pro herede aut pro possessore possidet ex ea hereditate, aut cum iubet ei, qui vi possessione fundi deiectus sit, restitui possessionem. exhibitoria sunt, per quae iubet exhiberi veluti eum, cuius de libertate agitur, aut libertum, cui patronus operas indicere velit, aut parenti liberos, qui in potestate eius sunt. sunt tamen qui putant proprie interdicta ea vocari, quae prohibitoria sunt, quia interdicere est denuntiare et prohibere : restitutoria autem et exhibitoria proprie decreta vocari : sed tamen optinuit omnia

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invito te ius est, quominus illi eo eave mortuum inferre et ibi sepelire liceat vim fieri veto' ; that of the third prohibitory interdict mentioned in the text 'in loco sacro facere inve eum immittere quid veto' Dig. 43. 6 ; that of the fourth 'ne quid in flumine publico ripave eius immittas, quo statio iterve navigio deterior sit fiat' Dig. 43. 12.

Restitutorium as applied to interdicts has the same wide meaning as restituere in general ; it denotes, besides the restitution of possession, as in unde vi, § 6 inf., (1) delivery of possession where none has preceded (as in quorum bonorum, § 3 inf.) ; (2) the removal of a nuisance or demolition of an unlawful structure, Dig. 43. 8. 2. 35 and 43.

For the meaning of exhibitorium and exhibere see on Tit. 6. 31 supr. Theophilus illustrates the interdict by which the praetor 'iubet exhiberi eum cuius de libertate agitur' by saying *ἀποκρύπτεις τὸν ἐμὸν ἀδελφόν, λέγων αὐτὸν εἶναι δοῦλον σόν, ἐμοῦ βουλομένου περὶ τῆς αὐτοῦ δικάσασθαι ἐλευθερίας* : it was thus a different remedy from the interdictum de homine libero exhibendo, which lay only for the production of a person whose free status was not questioned : 'plane si dubitat, utrum liber an servus sit, vel facit status controversiam, recedendum erit ab hoc interdicto et agenda causa libertatis ; etenim recte placuit tunc demum hoc interdictum locum habere, quotiens quis pro certo liber est : ceterum si quaeratur de statu, non oportet praeiudicium fieri alienae cognitioni' Dig. 43. 29. 3. 7.

For the production of a libertus 'cui patronus operas indicere velit' cf. Gaius iv. 162. Certain services could be legally claimed from the libertus by his patron if they had been promised under oath ; see p. 401 supr. The interdict is not mentioned elsewhere in the Corpus iuris.

For the pater's right to enforce production of children in his power see Dig. 43. 30 ; the formula of the interdict ran 'qui quaeve in potestate Titii est, si is eave apud te est dolove malo tuo factum est quominus apud te esset, ita eum eamve exhibeas'.

Gaius (iv. 140) says that orders enjoining restitution or production

G.iv.143. 2 interdicta appellari, quia inter duos dicuntur. **Sequens**
divisio interdictorum haec **est,** quod quaedam **adipiscendae**
possessionis causa comparata sunt, quaedam **retinendae,** quae-
G.iv.144. 3 dam **reciperandae. Adipiscendae possessionis causa interdictum**
accommodatur bonorum possessori, quod appellatur **quorum**
bonorum, eiusque vis et potestas haec est, ut, quod ex his
bonis quisque, quorum possessio alicui data est, pro herede
aut pro possessore possideat, id ei, cui bonorum possessio data
est, restituere debeat. pro herede autem possidere videtur,
qui putat se heredem esse : pro possessore is possidet, qui
nullo iure **rem hereditariam vel etiam totam hereditatem**
sciens ad se non pertinere possidet. ideo autem adipiscendae
possessionis vocatur interdictum, quia ei tantum utile est, qui
nunc primum conatur adipisci rei possessionem : itaque si
quis adeptus possessionem amiserit eam, hoc interdictum ei
G. iv. 147. **inutile** est. **interdictum quoque, quod appellatur Salvianum,**

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were not improperly called decreta ; cf. the lex de Gall. Cisalp. 'decernet, interdicetve.' For interdicere in the sense of 'ordering' cf. 'ut navigare liceat . . . interdicam' Dig. 43. 14. 1 pr. Justinian's derivation of interdictum is reproduced by Theophilus, *ἰντέρδικτον . . . ἐστὶν ὁμιλία Πραίτωρος μεταξὺ δύο τινῶν*, and possibly is supported by Varro, ling. Lat. 4. 36 'intertrimentum ab eo, quod duo quae inter se trita et deminuta. . .' Isidorus' etymology is different, 'interdictum est, quia ad tempus interim dicitur' Orig. 5. 25.

§ 2. This of course is a division only of Possessory interdicts ; it is 'sequens', or subordinate ; that into prohibitoria, etc., is 'summa' (§ 1 supr.) or 'principalis' (Gaius iv. 142).

§ 3. The formula of quorum bonorum is given in Dig. 43. 2. 1 'quorum bonorum ex edicto meo illi possessio data est, quod de his bonis pro herede aut pro possessore possides, possideresve si nihil usucaptum esset, quodque dolo malo fecisti uti desineres possidere, id illi restituas'. Two views are held as to its nature ; Savigny maintains that it was a definitive remedy by which the bonorum possessor obtained a judicial recognition of his title as praetorian heir, while most other writers on the subject are of opinion that it was merely a summary and provisional machinery by which he was enabled to get actual possession of the corporeal property belonging to the deceased's universitas iuris, his right to the universitas itself being established by hereditatis petitio (direct or possessoria, according as he was civil heir or not). The latter view seems favoured by the text above, and to be conclusively proved by Dig. 43. 2. 2 'interdicto quorum bonorum debitores hereditarii non tenentur, sed tantum corporum possessores', and Cod. 8. 2. 3 'ergo iubemus, ut omnibus frustrationibus amputatis

adipiscendae possessionis causa comparatum est eoque utitur dominus fundi de rebus coloni, quas is pro mercedibus fundi

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per interdictum quorum bonorum in petitorem corpora transferantur, secundaria actione proprietatis non exclusa'.

No one could apply for the interdict, even though he were civil heir (Gaius iii. 34), who had not by agnitio obtained bonorum possessio. On application made by such person it would be directed against any one who was in possession of corporeal property belonging to the inheritance either pro herede or pro possessore. Possessores pro herede include (besides persons 'qui putant se heredes esse') others who had made agnitio, Dig. 5. 3. 11 pr.; ib. 20. 13, or to whom the inheritance or part of it had been transferred per fideicommissum, ib. 13. 5–7, or who had bought the inheritance in whole or part, or had so received it dotis causa, ib. 13. 4. Possession pro possessore is defined in Dig. 5. 3. 11. 1; ib. 13 pr. 'pro possessore vero possidet praedo, qui interrogatus, cur possideat, responsurus sit, quia possideo, nec ullam causam possessionis possit dicere, et ideo fur et raptor petitione hereditatis tenentur'.

As appears from the text of the interdict cited above, any one could be proceeded against by it who had fraudulently got rid of the possession of res hereditariae, and even a completed usucapion would not protect the possessor, the senatusconsult of Hadrian (Gaius ii. 57), which had been passed primarily in the interests of civil heirs, having been extended also to praetorian successors. The grantee of the interdict would obtain possession of the object in dispute on proving not only that he had accepted the succession, but that no one else had a better right than he: 'quamvis bonorum possessionem agnovisti, non aliter possessor constitui poteris quam si te defuncti filium esse probaveris' Cod. 8. 2. 1.

For the interdictum Salvianum cf. p. 548 supr. Its relation to the actiones Serviana and hypothecaria seems identical with that of quorum bonorum to hereditatis petitio; the plaintiff, alleging that he has a hypothec over specific property of his debtor, which he fears may be made away with before he can prove his right, obtains possession by the interdict, and then proves his right by the action; 'in Salviano interdicto, si in fundum communem duorum pignora sint ab aliquo invecta, possessor vincet, et erit iis descendendum ad Servianum iudicium' Dig. 43. 33. 2. It would appear that the interdict lay not only against the hypothecary debtor himself, but against any one who had possession of the property subject to the hypothec: *κατὰ παντὸς κατέχοντος τὰ τοῦ κολωνοῦ πράγματα κινηθήσεται τὸ Σαλβιάνειον ἰντέρδικτον* Theoph.; cf. Dig. 43. 33. 1 ('et adversus extraneos . . . dari debebit'): though Cod. 8. 9. 1 is irreconcileable: 'non interdicto Salviano, id enim tantummodo adversus conductorem debitoremve competit.'

Other examples of interdicts adipiscendae possessionis given by Gaius (iv. 145–6) are those called possessorium and sectorium, the first being the remedy of the highest bidder in the bankruptcy procedure called bonorum venditio, p. 389 supr., the second that of the sector or purchaser at a state auction.

G.iv.148. 4 **pignori futuras pepigisset. Retinendae possessionis causa comparata sunt** interdicta **uti possidetis et utrubi, cum ab utraque parte de proprietate alicuius rei controversia sit et ante quaeritur, uter ex litigatoribus possidere et uter petere debeat.** namque nisi ante exploratum fuerit, utrius eorum possessio sit, non potest petitoria actio institui, quia et civilis et naturalis ratio facit, ut alius possideat, alius a possidente petat. et quia longe commodius est possidere potius quam petere, ideo plerumque et fere semper ingens existit contentio de ipsa possessione. commodum autem possidendi in eo est, quod, etiamsi eius res non sit qui possidet, si modo actor non potuerit suam esse probare, remanet suo loco possessio: propter quam causam, cum obscura sint utriusque iura, contra petitorem iudicari solet. Sed interdicto quidem **uti pos-**
G. iv. 149. **sidetis de fundi vel aedium possessione** contenditur, **utrubi vero** interdicto **de rerum mobilium possessione.** quorum vis et potestas plurimam inter se differentiam apud veteres
G. iv. 150. habebat: nam uti possidetis interdicto is vincebat, qui **interdicti tempore** possidebat, **si** modo **nec vi nec clam nec precario** nanctus fuerat ab adversario possessionem, etiamsi alium vi expulerit aut clam abripuerit alienam possessionem aut precario rogaverat aliquem, ut sibi possidere liceret: utrubi vero interdicto is vincebat, **qui maiore parte eius anni nec vi nec clam nec precario ab adversario** possidebat. hodie tamen aliter observatur: nam utriusque interdicti potestas quantum ad possessionem pertinet exaequata est, ut ille vincat et in re soli et in re mobili, qui possessionem nec vi

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§ 4. Opinions have differed very much as to the true nature and purpose of the interdicts uti possidetis and utrubi. It will have been obvious from the account given of them in a preceding note on this Title, and from the opening words of this section, which correspond exactly with Gaius iv. 148, that their original object was to determine a question preliminary to a vindicatio—which of two parties, each of whom claims to be entitled to the possession of specific property, is actually to have the possession during the vindicatio itself, and so play the *rôle* of defendant? The commodum possessionis, or advantage which the defendant had over the plaintiff, is clearly put in the text; if the latter could not prove his case, the possession remained with him; 'in pari causa possessor potior' Dig. 50. 17. 128 pr.; *ὅταν καὶ τῷ φεύγοντι καὶ τῷ διώκοντι ψῆφοι ἴσαι, ὁ φεύγων νικᾷ*, Aristotle, Probl. 29. 12, 'necessitas probandi incumbit

nec clam nec precario ab adversario litis contestationis tempore detinet. **Possidere autem videtur quisque non solum,** 5 G.iv.153.

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illi, qui agit' Dig. 22. 3. 21. Of course the party vanquished in the possessory process might acquiesce in the decision there, and not push matters to a vindicatio at all; but the true function of the interdict was to clear the way for the action.

This, in fact, is the main purpose of these two interdicts under Justinian. It is uncertain which of two parties, each of whom claims to be dominus of specific property, shall be defendant in the real action which is to settle the question of dominium; and this is determined by a preliminary process, the interdict, which results in the award of the possession (and therefore of the *rôle* of defendant) to the one who at litis contestatio (i. e. at the time when the hearing began) actually had possession without having obtained it by violence, secrecy, or permission, from his adversary; if the latter could prove that his possession was defective in any of these respects, the possession was adjudged to him instead, and to this extent the interdict was reciperandae, not retinendae possessionis, Dig. 43. 17. 1. 9; ib. 3 pr.

It would seem too that uti possidetis, if not utrubi as well, had in course of time come to be employed when one person interfered in any way whatsoever with the possession of another, much in the same sort of manner as the English assize of Novel Disseisin came to lie against any one who in any way whatsoever interfered with the enjoyment of the freehold, and even for disturbance of common (Dig. 43. 17. 3. 4). In this form it had lost its double character, and was in effect a remedy ex delicto. Both interdicts are said to be limited to a year; by this is meant that where brought on an actual disturbance of possession, they must be brought within a year of the date of such disturbance, Dig. 43. 17. 1 pr., except so far as the defendant had been enriched by his act, Dig. 43. 1. 4, and that no vitium possessionis (vi, clam, precario) could be advanced which did not fall within a year next immediately preceding litis contestatio in the interdict.

The date of the assimilation of utrubi to uti possidetis in the point noticed at the end of the section is uncertain: that it had not been effected so early as Diocletian is clear from Fragm. Vat. 293, so that the passage in Dig. 43. 31 attributed to Ulpian must be an interpolation.

§ 5. For the Roman theory of Possession in general see Excursus III supr. The following texts will help to elucidate the present passage:

Dig. 41. 2. 9 'generaliter quisquis omnino nostro nomine sit *in possessione*, veluti procurator, hospes, amicus, nos *possidere* videmur', ib. 10. 1 'aliud est . . . . *possidere*, longe aliud *in possessione esse*', ib. 25. 1 'nec inter colonum et servum nostrum, per quem possessionem retinemus, quicquam interest', Gaius iv. 153 'quinetiam plerique putant, *animo* quoque retineri possessionem, quod nostrorum verbi gratia aestivorum et hibernorum saltuum animo solo, quia voluerimus, ex quo discessimus, reverti, retinere possessionem videamur', Paul. Sent. Rec. 5. 2. 1 '(pos-

si ipse possideat, sed et si eius nomine aliquis in possessione sit, licet is eius iuri subiectus non sit, qualis est colonus et inquilinus: per eos quoque, apud quos deposuerit quis aut quibus commodaverit, ipse possidere videtur: et hoc est, quod dicitur retinere possessionem posse aliquem per quemlibet, qui eius nomine sit in possessione. quin etiam animo quoque retineri possessionem placet, id est ut, quamvis neque ipse sit in possessione neque eius nomine alius, tamen si non relinquendae possessionis animo, sed postea reversurus inde discesserit, retinere possessionem videtur. adipisci vero possessionem per quos aliquis potest, secundo libro exposuimus. nec ulla dubitatio est, quin animo solo possessionem adipisci

G.iv.154. 6 nemo potest. **Reciperandae possessionis causa solet** interdici, **si quis ex possessione** fundi vel aedium **vi deiectus fuerit: nam ei proponitur interdictum unde vi, per quod is qui deiecit cogitur ei restituere possessionem,** licet is ab eo qui vi deiecit **vi vel clam vel precario possidebat.** sed ex sacris constitutionibus, ut supra diximus, si quis rem per vim occupaverit, si quidem in bonis eius est, dominio eius privatur, si aliena, post eius restitutionem etiam aestimationem rei dare vim passo compellitur. qui autem aliquem de possessione per vim deiecerit, tenetur lege Iulia de vi privata aut de vi publica: sed de vi privata, si sine armis vim fecerit, sin autem cum armis eum de possessione expulerit, de vi publica. armorum

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sessionem) retinere nudo animo possumus, sicut in saltibus hibernis aestivisque contingit', Dig. 41. 2. 3. 1 'apiscimur possessionem corpore et animo, neque per se animo, aut per se corpore', ib. 8.

For the difference between colonus and inquilinus see p. 438 supr. The reference for acquisition of possession through others is to Bk. ii. 9. 4 supr.

§ 6. Under the older law there were two interdicts for recovering possession of land or buildings from which a person had been violently ejected (ad duas dissimiles res duo disiuncta interdicta sunt, Cic. pro Caec. 32); one, the ordinary interdict unde vi, applying where there had been no use of weapons (vis quotidiana); the other, interdictum de vi armata, where there had.

In the first case the ejector could plead the exceptio vitiosae possessionis, i. e. the grantee of the interdict was successful only if he could show that he had not himself obtained possession vi, clam, or precario from the other (lex Thoria 7, Cic. pro Tullio 44–5, Gaius iv. 154). In the second the mode in which his possession had originated was immaterial,

autem appellatione non solum scuta et gladios et galeas
significari intellegimus, sed et fustes et lapides. **Tertia divisio** 7 G.iv.156.
interdictorum haec est, quod aut simplicia sunt aut duplicia.
simplicia sunt, veluti in quibus alter actor, alter reus est : G. iv. 157.
qualia sunt omnia restitutoria aut exhibitoria : namque actor
est, qui desiderat aut exhiberi aut restitui, reus is, a quo de-
sideratur, ut restituat aut exhibeat. prohibitoriorum autem G. iv. 158.
interdictorum alia simplicia sunt, alia duplicia. simplicia sunt, G. iv. 159.
veluti cum prohibet praetor in loco sacro vel in flumine
publico ripave eius aliquid fieri (nam actor est, qui desiderat,
ne quid fiat, reus, qui aliquid facere conatur) : duplicia sunt G. iv. 160.
veluti uti possidetis interdictum et utrubi. ideo autem du-
plicia vocantur, quia par utriusque litigatoris in his condicio
est nec quisquam praecipue reus vel actor intellegitur, sed
unusquisque tam rei quam actoris partem sustinet.

De ordine et veteri **exitu** interdictorum supervacuum est 8 G.iv.161.
hodie dicere: nam quotiens extra ordinem ius dicitur, qualia

Gaius iv. 155. This difference, however, as appears from the text, had disappeared in Justinian's time, possibly in consequence of Valentinian's enactment (Cod. 8. 4. 7) here referred to, for which see on Tit. 2. 1 supr. Originally too only the first of these interdicts had been barred by limitation of a year, Cic. ad Fam. 15, 16, but under Justinian this distinction too had ceased to exist, and there was only one interdict de or unde vi, which could be brought after a year had elapsed from the ejectment only so far as the ejector had been thereby enriched, Dig. 43. 16. 1 pr. Justinian allowed unde vi to be brought even where land had been entered upon in the possessor's absence, Cod. 8. 4. 11.

The limitation of this interdict to res immobiles (Paul. Sent. Rec. 5. 6. 5, Dig. 43. 16. 1. 6) seems to hold also under Justinian. The action under the constitution of Valentinian (which applied also to moveables) would be one of the actions which lay upon theft in addition to the actio furti, Tit. 1. 19 and notes supr. For the lex Iulia de vi see Tit. 18. 8 and notes inf.

§ 7. For the sense in which uti possidetis and utrubi were 'double' in the formulary period see note p. 605 supr. Under Justinian they are double, as is clear from the text, because there is no difference, as in ordinary actions and simple interdicts, between the respective *rôles* of plaintiff and defendant ; the burden of proof lies upon the two parties equally, and whichever proves that he has not obtained possession vi, clam, or precario from the other will win, and the other be condemned ; 'hi, quibus competit (interdictum) et actores et rei sunt' Dig. 43. 17. 3. 1.

§ 8. For interdict procedure in the earlier period and under Justinian see the first note upon this Title.

sunt hodie omnia iudicia, non est necesse reddi interdictum, sed perinde iudicatur sine interdictis, atque si utilis actio ex causa interdicti reddita fuisset.

XVI

DE POENA TEMERE LITIGANTIUM

Nunc admonendi sumus magnam curam egisse eos, qui iura
sustinebant, ne facile homines ad litigandum procederent:
quod et nobis studio est. idque eo maxime fieri potest, quod
temeritas tam agentium quam eorum cum quibus ageretur
modo pecuniaria poena, modo iurisiurandi religione, modo
1 metu infamiae coercetur. Ecce enim iusiurandum omnibus
qui conveniuntur ex nostra constitutione defertur: nam reus
non aliter suis allegationibus utitur, nisi prius iuraverit, quod
putans se bona instantia uti ad contradicendum pervenit. at
G. iv. 171. **adversus infitiantes ex quibusdam causis dupli** vel tripli **actio**

Tit. XVI.—1. In the time of Gaius the defendant could be compelled to swear 'non calumniae causa se ad inficias ire' only where he was not restrained from vexatiously defending the action by some other recognized motive, such as the penal sponsio in condictio for certa pecunia credita and the actio de constituta pecunia, the duplication of damages in some actions on denial of liability, or the penal nature of the action itself, Gaius iv. 172. By Cod. 2. 59. 2 Justinian required the oath from all defendants and their advocates.

By a defendant's 'allegationes' are to be understood the evidence and arguments in support of his contradictio, Cod. 3. 1. 14. 1. The oath was taken on the Bible, 'sacrosanctae scripturae' Cod. loc. cit.: 2. 59. 2 pr. The primary juristic signification of 'instantia' seems to be 'keenness', 'energy' ('diligenti studio instantiaque complere opera' Cod. 8. 12. 22, 'stricta instantia falsum arguere paratus' Cod. 9. 22. 24), whence it comes to mean, as here, a contention ('believing that his contention in defence is honest').

For the actions in which it was said 'adversus inficiantes lis crescit in duplum' see on Bk. iii. 27. 7 supr.: cf. Tit. 6. 19 and 26 supr. The actions to which Justinian alludes, in which 'adversus inficiantem lis crescit in triplum', are unknown; those on furtum conceptum and oblatum (p. 515 supr.) were in triplum 'sive quis neget sive fateatur', and the triple penalty in Tit. 6. 24 supr. did not apparently result from a denial of liability.

In the earlier procedure vexatious litigation in plaintiffs had been restrained in four ways: 'actoris quoque calumnia coercetur modo calumniae iudicio, modo contrario, modo iureiurando, modo restipula-

constituitur, veluti si damni iniuriae aut legatorum locis venerabilibus **relictorum nomine agitur. statim autem ab initio** G. iv. 173.
pluris quam simpli est actio veluti furti manifesti quadrupli, nec manifesti dupli : nam ex his causis et aliis quibusdam, sive quis neget sive fateatur, pluris quam simpli est actio.
item **actoris quoque calumnia coercetur :** nam etiam actor G. iv. 174.
pro calumnia iurare cogitur ex nostra constitutione. utriusque etiam partis advocati iusiurandum subeunt, quod alia nostra constitutione comprehensum est. haec autem omnia pro veteris **calumniae** actione introducta sunt, quae in desuetudinem abiit, quia in **partem decimam** litis actorem multabat, quod nusquam factum esse invenimus: sed pro his introductum est et praefatum iusiurandum et ut improbus litigator etiam damnum et impensas litis inferre adversario suo cogatur.
Ex quibusdam iudiciis damnati ignominiosi fiunt, veluti furti, vi 2 G.iv.182.

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tione' Gaius iv. 174. In actions where there was a sponsio poenalis, the defendant could require that the plaintiff should promise him by restipulatio an equivalent sum in the event of his being unable to prove his case. In other suits, if absolved, he could often bring against him an action in the nature of 'malicious prosecution'. By the actio calumniae he might recover $\frac{1}{10}$ (in interdicts $\frac{1}{4}$) of the value in dispute in the previous action, but had to prove that the other had sued him knowing that he had no ground of action, 'calumnia enim in adfectu est' Gaius iv. 178. By the contrarium iudicium, which was an alternative to this, but which lay only against an unsuccessful plaintiff in certain specific actions (e. g. iniuriae, Gaius iv. 177), and in which it was unnecessary to prove malice, he could similarly recover damages equivalent to some fraction of the amount claimed in the previous action. Neither of these iudicia, however, lay, nor could the defendant claim a penal restipulatio, if he had compelled the plaintiff to take the iusiurandum calumniae, i. e. to swear that to the best of his belief he had a good ground of action, Gaius iv. 181.

Under Justinian the penal sponsio and restipulatio in the two actions specified had disappeared, and, as is remarked in the text, the iudicia calumniae and contrarium were also obsolete, though they had still been in use in the age of Diocletian, Cod. Hermog. 5. 3. In lieu of these precautions the plaintiff had in all cases 'pro calumnia iurare' Cod. 2. 59. 2 pr., and the unsuccessful litigant had to pay his adversary's costs: 'sive autem alterutra parte absente sive utraque praesente lis fuerit decisa, omnes iudices, qui sub imperio nostro constituti sunt, sciant in expensarum causa victum victori esse condemnandum, quantum pro solitis expensis litium iuraverit, non ignorantes quod si hoc praetermiserint, ipsi de proprio huiusmodi poenae subiacebunt et reddere eam parti laesae coartabuntur' Cod. 3. 1. 13. 6.

§ 2. For the meaning of existimatio see on Bk. i. 16. 5 supr. As a

bonorum raptorum, iniuriarum, de dolo, item **tutelae, mandati, depositi,** directis non contrariis actionibus, **item pro socio,** quae ab utraque parte directa est et ob id quilibet ex sociis eo iudicio damnatus ignominia notatur. **sed furti** quidem **aut vi bonorum raptorum aut iniuriarum** aut de dolo **non solum damnati notantur ignominia, sed etiam pacti, et recte ; plurimum enim interest, utrum ex delicto aliquis an ex contractu debitor sit.**

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matter of fact, minutio existimationis, which was generically denoted by the term ignominia, most usually resulted from a citizen's getting into a position in which the Edict branded him with infamia, Dig. 3. 2. 1. Infamia attached, in consequence of a judicial sentence or something equivalent (infamia iuris) to all persons condemned in a iudicium publicum (Dig. 48. 1. 7), or in any of the civil actions specified in the text (to which must be added the delictal action for sepulcri violatio, and, for the older law, the actio fiduciae, Gaius iv. 182), or found guilty of usury, Cod. 2. 12. 20, or ignominiously discharged from military service (Dig. 3. 2. 2), guardians removed as suspecti ob dolum, Bk. i. 26. 6 supr., and bankrupts (p. 390 supr.). Other persons became infames apart from anything in the nature of a judicial sentence (infamia immediata), e.g. wives taken in adultery, Dig. 23. 2. 43. 12 and 13 ; guardians or curators who married their female wards while under the age of 26, ib. 66. pr. ; and persons who violated a transactio (p. 401 supr.) made under oath, Cod. 2. 4. 41.

Under the Republic the consequence of infamia had been serious ; the infamis lost the political rights of civitas, viz. suffragium and honores ; was disabled from applying for the magistrate's judicial assistance except on behalf of himself and specified other persons (' postulare : postulare autem est, desiderium suum vel amici sui in iure apud eum, qui iurisdictioni praeest, exponere vel alterius desiderio contradicere ' Dig. 3. 1. 1. 2, ' hoc edicto continentur etiam omnes, qui edicto praetoris ut infames notantur : qui omnes nisi pro se et certis personis ne postulent ', ib. 8), and also was to a large extent incapable of being represented himself by an agent in legal process, Tit. 13. 11 and notes supr. ; finally certain matrimonial disabilities were imposed on him by the lex Iulia de maritandis, Ulpian, Reg. 13. Under Justinian, however, most of these consequences were inoperative or obsolete. On the whole subject see Greenidge, Infamia, chap. vi.

For the meaning of actio directa in this connection see p. 397 supr. ; for ' pacti ' cf. Dig. 3. 2. 6. 3 ' pactum sic accipimus, si cum pretio quantocunque pactus est ', Cod. 2. 12. 18 ' verum pactos eos demum, qui ullos adversariis nummos pro mala conscientia ex transactione numerassent, in hac causa placuit intellegi '. The compounding of a delict for money is as bad as being found guilty of having committed it.

Omnium autem actionum instituendarum principium ab ea 3
parte edicti proficiscitur, qua praetor edicit de in ius vocando: utique enim in primis adversarius in ius vocandus est, id est ad eum vocandus est, qui ius dicturus sit. qua parte praetor **parentibus et patronis, item liberis parentibusque patronorum** G. iv. 183.
et patronarum hunc praestat honorem, ut **non** aliter **liceat** liberis libertisque eos **in ius vocare**, quam si id ab ipso praetore postulaverint et impetraverint: et si quis aliter vocaverit, in eum **poenam** solidorum quinquaginta **constituit.**

XVII

DE OFFICIO IUDICIS

Superest, ut de officio iudicis dispiciamus. et quidem in primis illud observare debet iudex, ne aliter iudicet, quam legibus aut constitutionibus aut moribus proditum est. Et 1
ideo si noxali iudicio addictus est, observare debet, ut, si condemnandus videbitur dominus, ita debeat condemnare: 'Publium Maevium Lucio Titio decem aureis condemno aut noxam dedere.' Et si in rem actum sit, sive contra petitorem 2
iudicavit, absolvere debet possessorem, sive contra possessorem, iubere eum debet, ut rem ipsam restituat cum fructibus. sed si in praesenti neget se possessor restituere posse et sine frustratione videbitur tempus restituendi causa petere, indulgendum est ei, ut tamen de litis aestimatione caveat cum fideiussore, si intra tempus quod ei datum est non restituisset.

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§ 3. For the form of summons under Justinian see on Tit. 6. 24 supr., and for the summons of parents and patrons without the praetor's permission cf. Gaius iv. 46.

Tit. XVII.—1. For noxal actions see Tit. 8 supr. and notes: cf. Dig. 42. 1. 6. 1 'decem aut noxae dedere condemnatus iudicati in decem tenetur, facultatem autem noxae dedendi ex lege accipit: at is qui stipulatus est decem aut noxae dedere non potest decem petere'.

§ 2. A defendant would be entitled to time for a restitutio, that is to say, his application would not be put down to frustratio, only where the obstacle was natural, 'neque tantum in ipsius debitoris persona facultas dandi deest', cf. Dig. 45. 1. 73. pr. 'interdum pura stipulatio ex re ipsa dilationem capit, veluti si id quod in utero sit aut fructus futuros aut domum aedificari stipulatus sit', ib. 137. 4 'sed haec recedunt ab impedimento naturali et respiciunt ad facultatem dandi: est autem facultas personae commodum incommodumque, non rerum quae promittuntur'.

et si hereditas petita sit, eadem circa fructus interveniunt, quae diximus intervenire in singularum rerum petitione. illorum autem fructuum, quos culpa sua possessor non perceperit, in utraque actione eadem ratio paene fit, si praedo fuerit. si vero bona fide possessor fuerit, non habetur ratio consumptorum neque non perceptorum: post inchoatam autem petitionem etiam illorum ratio habetur, qui culpa possessoris percepti non sunt vel percepti consumpti sunt.
3 Si ad exhibendum actum fuerit, non sufficit, si exhibeat rem is cum quo actum est, sed opus est, ut etiam causam rei debeat exhibere, id est ut eam causam habeat actor, quam habiturus esset, si, cum primum ad exhibendum egisset, exhibita res fuisset: ideoque si inter moras usucapta sit res a possessore, nihilo minus condemnatur. praeterea fructuum medii temporis, id est eius, quod post acceptum ad exhibendum iudicium ante rem iudicatam intercessit, rationem habere debet iudex. quod si neget is, cum quo ad exhibendum actum est, in praesenti exhibere se posse et tempus exhibendi causa petat idque sine frustratione postulare videatur, dari ei debet, ut tamen caveat se restituturum: quod si neque statim iussu iudicis rem exhibeat neque postea exhibiturum se caveat, condemnandus sit in id, quod actoris
4 intererat ab initio rem exhibitam esse. Si familiae erciscundae

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For the difference between a bona fide and a mala fide possessor (praedo) in respect of liability for fructus see on Bk. ii. 1. 35 supr. The former's mental attitude was by a fiction represented as having changed at litis contestatio: 'bonae fidei possessor postea (i.e. petita hereditate) et ipse praedo est' Dig. 5. 3. 31. 3.

§ 3. For the nature of the actio ad exhibendum see on Tit. 6. 31 supr. 'Causa' in this connection does not seem to include fructus, which are mentioned later in the paragraph; but, as this action as a rule only paved the way to further litigation, it rather denotes (as seems clear from the illustration in the text, 'ideoque si . . . condemnatur') advantages of legal position: 'in eadem causa in qua fuit, cum iudicium acciperetur, ut quis copiam rei habens possit exsequi actione in nullo casu laesa' Dig. 10. 4. 9. 5. Usucapion was not properly interrupted by litis contestatio with the possessor, but, if the plaintiff proved that, at that date, he was owner, he would still be condemned, Dig. 6. 1. 18; 41. 4. 2. 21; 41. 5. 2 pr.

§ 4. For the general nature of the iudicia divisoria spoken of in this and the two following paragraphs see on Tit. 6. 20 supr., and for this action in particular p. 458 supr. Debts owed by and to the hereditas were

iudicio actum sit, singulas res singulis heredibus adiudicare
debet et, si in alterius persona praegravare videatur adiudi-
catio, debet hunc invicem coheredi certa pecunia, sicut iam
dictum est, condemnare. eo quoque nomine coheredi quisque
suo condemnandus est, quod solus fructus hereditarii fundi
percepit aut rem hereditariam corrupit aut consumpsit. quae
quidem similiter inter plures quoque quam duos coheredes
subsequuntur. Eadem interveniunt et si communi dividundo 5
de pluribus rebus actum fuerit. quod si de una re, veluti de
fundo, si quidem iste fundus commode regionibus divisionem
recipiat, partes eius singulis adiudicare debet et, si unius pars
praegravare videbitur, is invicem certa pecunia alteri con-
demnandus est: quod si commode dividi non possit, vel
homo forte aut mulus erit de quo actum sit, uni totus adiu-
dicandus est et is alteri certa pecunia condemnandus. Si 6
finium regundorum actum fuerit, dispicere debet iudex, an
necessaria sit adiudicatio. quae sane uno casu necessaria est,
si evidentioribus finibus distingui agros commodius sit, quam
olim fuissent distincti: nam tunc necesse est ex alterius agro
partem aliquam alterius agri domino adiudicari. quo casu
conveniens est, ut is alteri certa pecunia debeat condemnari.
eo quoque nomine damnandus est quisque hoc iudicio, quod
forte circa fines malitiose aliquid commisit, verbi gratia quia
lapides finales furatus est aut arbores finales cecidit. con-
tumaciae quoque nomine quisque eo iudicio condemnatur,

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ipso iure divided among the coheredes: 'ea quae in nominibus sunt non recipiunt divisionem, cum ipso iure in portiones hereditarias ex lege duodecim tabularum divisa sunt' Cod. 3. 36. 6, though the judge might properly appoint any one of the heirs as the fit person to sue or be sued on specific claims or liabilities 'partim suo partim procuratorio nomine, quia saepe et solutio et exactio partium non minima incommoda habet' Dig. 10. 2. 3. Certain other res hereditariae were exempted from partition, either because they were in their very nature indivisible (e. g. praedial servitudes) or from their having already been specifically assigned to this or that heres by the testator, Dig. ib. 44 pr.

§ **5**. For the actio communi dividundo cf. Bk. iii. 27. 3 supr.

§ **6**. For the actio finium regundorum see on Tit. 6. 20 supr. 'Hoc iudicium locum habet in confinio praediorum rusticorum' Dig. 10. 1. 4. 10. The wilful removal of boundaries was punished extra ordinem, Paul. Sent. Rec. 1. 16; 'quod si per ignorantiam aut fortuito lapides furati sunt, sufficit eos (servos) verberibus decidere' Dig. 47. 21. 2.

veluti si quis iubente iudice metiri agros passus non fuerit.
7 Quod autem istis iudiciis alicui adiudicatum sit, id statim eius fit cui adiudicatum est.

XVIII

DE PUBLICIS IUDICIIS

Publica iudicia neque per actiones ordinantur nec omnino quidquam simile habent ceteris iudiciis, de quibus locuti sumus, magnaque diversitas est eorum et in instituendis et
1 in exercendis. Publica autem dicta sunt, quod cuivis ex
2 populo exsecutio eorum plerumque datur. Publicorum iudiciorum quaedam capitalia sunt, quaedam non capitalia. capitalia dicimus, quae ultimo supplicio adficiunt vel aquae et ignis interdictione vel deportatione vel metallo: cetera si

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§ **7**. Hence adiudicatio is a civil mode of acquisition, p. 225 supr. 'adiudicatione dominium nanciscimur per formulam familiae erciscundae, communi dividundo, finium regundorum' Ulpian, Reg. 19. 16.

Tit. XVIII. For the general history of Roman criminal law see Maine's Ancient Law, chap. x. Iudicia publica in the later period were commenced by an indictment or information ('causa criminis ordinata, id est, inscriptionibus depositis' Cod. 9. 45. 1), the form of which is preserved in Dig. 48. 2. 3 pr. 'apud illum praetorem vel proconsulem L. Titius professus est se Maeviam lege Iulia de adulteriis ream deferre, quod dicat eam cum Gaio Seio in civitate illa, domo illius, mense illo, consulibus illis adulterium commisisse.' But, the procedure in Justinian's time being altogether extra ordinem, i.e. that prescribed for the several iudicia publica by statute having fallen into disuse, the differences between actions and prosecutions were not so marked as might be inferred from the text above.

§ **1**. Plerumque belongs to 'cuivis ex populo'. Impuberes, infames, and the very poor were as a rule disabled from prosecuting, Dig. 48. 2. 8 sq., as also were women and soldiers unless the crime was committed against either themselves or some near relation, Cod. 9. 1. 4 and 8.

§ **2**. 'Licet "capitalis" Latine loquentibus omnis causa existimationis videatur, tamen appellatio capitalis mortis vel amissionis civitatis intellegenda est' Dig. 50. 16. 103. The looser use of the term is not uncommon in Cicero, e. g. pro Quinctio 4. 7. 8. 9. 19, etc. For the relative severity of these punishments cf. Dig. 48. 19. 28 pr. 'proxima morti poena, metalli coercitio: post deinde in insulam deportatio'; for the latter cf. Bk. i. 16. 2 supr. For the iudicia publica which were not capitalia cf. Dig. l. c. 1 'ceterae poenae ad existimationem, non ad capitis periculum

qua infamiam irrogant cum damno pecuniario, haec publica quidem sunt, non tamen capitalia. Publica autem iudicia 3
sunt haec. lex Iulia maiestatis, quae in eos, qui contra imperatorem vel rem publicam aliquid moliti sunt, suum vigorem extendit. cuius poena animae amissionem sustinet et memoria rei et post mortem damnatur. Item lex Iulia de 4
adulteriis coercendis, quae non solum temeratores alienarum nuptiarum gladio punit, sed etiam eos, qui cum masculis infandam libidinem exercere audent. sed eadem lege Iulia etiam stupri flagitium punitur, cum quis sine vi vel virginem vel viduam honeste viventem stupraverit. poenam autem eadem lex irrogat peccatoribus, si honesti sunt, publicationem

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pertinent'. 'Damno pecuniario' may be supplemented from Dig. ib. 2 'pecuniaria aut in corpus aliqua coercitio'.

§ 3. The lex Iulia maiestatis was passed by Julius Caesar, Cic. Philipp. 1. 9. Previously the law of treason had rested partly on usage (Livy 1. 26), partly on the Twelve Tables (Dig. 48. 4. 3 pr.), and a lex Cornelia (Cic. in Pis. 21, pro Cluent. 35). The intention to commit the offence was punished no less than its execution (moliti sunt): 'qui cogitaverit . . . eadem enim severitate voluntatem sceleris, qua effectum, puniri iura voluerunt' Cod. 9. 8. 5 pr. Perhaps the same rule was observed in all crimes, 'in maleficiis voluntas spectatur, non exitus' Dig. ad leg. Corn. de sicariis 48. 8. 14. The lex Iulia had substituted a perpetual aquae et ignis interdictio for the older punishment of death, Paul. Sent. Rec. 5. 29. 1; but the latter was re-established as early as Tiberius, Tac. Ann. 6. 18, Suetonius, Tiberius 58 sq.

Memoriae damnatio (for which cf. Bk. iii. 1. 5 supr.) was an exception from the general rule 'extinguitur crimen mortalitate' Dig. 48. 4. 11; its effect was bonorum publicatio or confiscation, involving rescission of the criminal's will and donationes inter virum et uxorem. A constitution of M. Aurelius (Cod. 9. 8. 6. 2) introduced the practice of finding persons guilty of treason after their decease, which was unknown in the age of Tiberius, Tac. Ann. 6. 29.

§ 4. The lex Iulia de adulteriis was passed by Augustus Caesar, Dig. 48. 5. 1. The penalties which it really inflicted seem to have been relegatio in insulam and partial confiscation of the property of both man and woman, Paul. Sent. Rec. 2. 26. 14: cf. Tac. Ann. 2. 50. 85 'in insulam . . . abdita est', ib. 3. 24 '(Augustus) adulteros morte aut fuga punivit, suas ipse leges egrediens': ib. 4. 42. For these death was substituted by Constantine, Cod. 9. 9. 31; it seems usually to have been inflicted on the woman as well, 'adulterii damnatam . . . si poenam capitalem evaserit' Cod. 9. 9. 9.

'Stuprum committit, qui liberam mulierem consuetudinis causa . . . continet' Dig. 48. 5. 34 pr. Corporis coercitio is illustrated by Dig. 48.

partis dimidiae bonorum, si humiles, corporis coercitionem
5 cum relegatione. Item lex Cornelia de sicariis, quae homicidas ultore ferro persequitur vel eos, qui hominis occidendi causa cum telo ambulant. telum autem, ut Gaius noster in interpretatione legis duodecim tabularum scriptum reliquit, vulgo quidem id appellatur, quod ab arcu mittitur: sed et omne significatur, quod manu cuiusdam mittitur: sequitur ergo, ut et lapis et lignum et ferrum hoc nomine contineatur. dictumque ab eo, quod in longinquum mittitur, a Graeca voce figuratum, *ἀπὸ τοῦ τηλοῦ*: et hanc significationem invenire possumus et in Graeco nomine: nam quod nos telum appellamus, illi *βέλος* appellant *ἀπὸ τοῦ βάλλεσθαι*. admonet nos Xenophon, nam ita scripsit: *καὶ τὰ βέλη ὁμοῦ ἐφέρετο, λόγχαι, τοξεύματα, σφενδόναι, πλεῖστοι δὲ καὶ λίθοι.* sicarii autem appellantur a sica, quod significat ferreum cultrum. eadem lege et venefici capite damnantur, qui artibus odiosis, tam venenis vel susurris magicis homines occiderunt vel mala
6 medicamenta publice vendiderunt. Alia deinde lex asperrimum crimen nova poena persequitur, quae Pompeia de

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19. 7 'veluti fustium admonitio, flagellorum castigatio, vinculorum verberatio'.

§ 5. The lex Cornelia de sicariis et veneficis (Dig. 48. 8) was passed by Sulla in the first or second year of his dictatorship, circ. 81 B. C. The charge on which Roscius Amerinus was defended by Cicero was based upon its provisions. Its penalties were aquae et ignis interdictio, to which Julius Caesar added forfeiture, Dig. 48. 8. 3. 5, Sueton. Jul. 42, but in many cases death was inflicted: 'sed solent hodie capite puniri, nisi honestiore loco positi fuerint, ut poenam legis sustineant' Dig. loc. cit.

The reference to Xenophon is to Anab. 5. 2. 14.

§ 6. The date of the lex Pompeia de parricidiis is B. C. 52.

By nova poena is not meant 'recens inventa' but 'strange, unparallelled'; its great antiquity is attested by Val. Maximus 1. 1. 14.

The wide meaning of parricidium is perhaps to be accounted for by varieties of derivation; *συστέλλοντες . . . τὴν πρώτην συλλαβὴν καὶ βραχεῖαν ποιοῦντες, τοὺς γονέας* (părentes), *ἐκτείνοντες δέ, τοὺς ὑπηκόους* (pārentes) *σημαίνουσιν*, Laurentius Lydus de mag. Rom. i. 26; 'Parricida, quod vel a pari componitur, vel a patre: quibusdam a parente videtur esse . . . Prisc. Gram. 1. Paricida non ubique is, qui parentem occidisset, sed qualemcunque hominem . . . Lex Numae . . . si quis hominem liberum morti duit, paricida esto', Festus; cf. Cic. pro Cluent. 11, Livy 40. 24, Quinctil. Inst. 8. 6. 35, and Mr. J. L. Strachan-Davidson's Problems of the Roman Criminal Law, i. pp. 21–24. The lex Pompeia confined the term to the killing of ascendants, husbands, wives, uncles, aunts, consobrini, stepfathers

parricidiis vocatur. qua cavetur, ut, si quis parentis aut filii aut omnino adfectionis eius, quae nuncupatione parricidii continetur, fata properaverit, sive clam sive palam id ausus fuerit, nec non is, cuius dolo malo id factum est, vel conscius criminis existit, licet extraneus sit, poena parricidii punietur et neque gladio neque ignibus neque ulla alia sollemni poena subicietur, sed insutus culleo cum cane et gallo gallinaceo et vipera et simia et inter eius ferales angustias comprehensus, secundum quod regionis qualitas tulerit, vel in vicinum mare vel in amnem proiciatur, ut omni elementorum usu vivus carere incipiat et ei coelum superstiti, terra mortuo auferatur. si quis autem alias cognatione vel adfinitate coniunctas personas necaverit, poenam legis Corneliae de sicariis sustinebit. Item 7
lex Cornelia de falsis, quae etiam testamentaria vocatur, poenam irrogat ei, qui testamentum vel aliud instrumentum falsum scripserit signaverit recitaverit subiecerit quive signum

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and stepmothers, fathers- and mothers-in-law, patrons and descendants, except the killing of a son by his father, Dig. 48. 9. 1. Hadrian sentenced a man who killed his son to deportatio, Dig. ib. 5, but this was not included under parricide till the time of Constantine, p. 125 supr.

Accessories were punished as severely as principals also under the lex Cornelia de sicariis (Cod. 9. 16. 7) and the lex Iulia peculatus, Dig. 48. 13. 1.

The punishment of the sack was very ancient among the Romans: 'Tarquinius rex M. Tullium . . . culleo insutum in mare abici iussit' Val. Maximus 1. 1. 13: cf. more maiorum, Dig. 48. 9. 9. pr. and 1: cf. Cic. pro Rosc. Am. 25, Epist. ad Quint. fratr. i. 2, Juvenal, Sat. iii. 8. 212 sq. The selection of animals was supposed to be symbolical, *μετὰ . . . ἀσεβῶν ζώων ἀσεβὴς ἄνθρωπος* Dosith. iii. 16, . . . *τὰ δὲ προειρημένα θηρία ἐμβάλλεται διὰ τοῦτο, ἐπειδὴ ὁμοιότροπα αὐτῷ ἐστί· τὰ μὲν γὰρ ἀναιρεῖ τοὺς γονεῖς, τὰ δὲ τῆς πρὸς αὐτοὺς οὐκ ἀπέχεται μάχης* Theoph. If there was no sea or river near, the criminal was torn asunder by wild beasts, 'hoc ita, si mare proximum sit: alioquin bestiis obicitur' Dig. 48. 9. 9 pr.

§ 7. This lex, which is called Cornelia testamentaria numaria by Cicero (in Verrem 21. 42), was passed by Sulla about the same time as that de sicariis (§ 5 supr.). The offence is defined in Dig. 48. 10. 23 'falsum videtur id esse, si quis alienum chirographum imitetur, aut libellum vel rationes intercidat vel describat, non qui alias . . . mentiuntur'. In the collatio legum Mos. et Rom. (viii. 7) Ulpian speaks of a senatusconsult made when Statilius Taurus and Scribonius Libo were consuls, which dealt with forgeries of documents other than wills, to which, as is clear from its name, the lex Cornelia principally related. The punishment of freemen for forgery seems to have varied much with their rank and the

adulterinum fecerit sculpserit expresserit sciens dolo malo. eiusque legis poena in servos ultimum supplicium est, quod et in lege de sicariis et veneficis servatur, in liberos vero
8 deportatio. Item lex Iulia de vi publica seu privata adversus eos exoritur, qui vim vel armatam vel sine armis commiserint. sed si quidem armata vis arguatur, deportatio ei ex lege Iulia de vi publica irrogatur: si vero sine armis, in tertiam partem bonorum publicatio imponitur. sin autem per vim raptus virginis vel viduae vel sanctimonialis vel aliae fuerit perpetratus, tunc et peccatores et ei, qui opem flagitio dederunt, capite puniuntur secundum nostrae constitutionis defini-
9 tionem, ex qua haec apertius possibile est scire. Lex Iulia peculatus eos punit, qui pecuniam vel rem publicam vel sacram vel religiosam furati fuerint. sed si quidem ipsi iudices tempore administrationis publicas pecunias subtraxerunt, capitali animadversione puniuntur, et non solum hi, sed etiam

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enormity of the offence, 'honestiores . . . in insulam deportantur . . . humiliores aut in metallum damnantur, aut capite puniuntur; servi autem [et] post admissum manumissi in crucem tolluntur' Paul. Sent. Rec. 5. 25. 1, 'pro modo delicti aut relegantur aut capite puniuntur' ib. 13, 'capitali supplicio, si id exigat magnitudo commissi, vel deportatione . . . imminente' Cod. 9. 22. 22. 2.

§ 8. The same distinction between armed and unarmed violence was drawn by the praetor in interdict law; see on Tit. 16. 6 supr. Between the enactment of the lex Iulia and Justinian's time the penalty for vis armata seems often to have been death (Paul. Sent. Rec. 5. 26. 1, Cod. Theod. 9. 10. 1), which, however, was but seldom inflicted in the latter's time, Cod. 9. 12. 7 and 8, Dig. 48. 6. 10. 2. Sanctimonialis is explained by Augustine, Serm. 23 'propria et excellentiori sanctitate virgines, quae in ecclesia nominantur, quas . . . usitatiore vocabulo sanctimoniales appellare consuevimus': cf. Cod. 1. 3. 54 'virginum vel viduarum vel diaconissarum, quae Deo fuerint dedicatae'.

§ 9. The full title of this statute was 'lex Iulia peculatus et de sacrilegis et de residuis' (for the last see § 11 inf.), Dig. 48. 13. Whether the unlawful appropriation of municipal property came within the penalties of peculatus was at first uncertain, but the question was decided in the affirmative by Trajan, Dig. 48. 13. 4. 7. For the meaning of religiosus see Bk. ii. 1. 9 and note, supr.; stealing from tombs, however, does not seem to have amounted to sacrilege, 'lapidem hunc movere . . . proximum sacrilegio maiores habuerunt' Cod. 9. 19. 5, 'sunt sacrilegi, qui publica sacra compilaverunt, at qui privata sacra . . . amplius quam fures, minus quam sacrilegi merentur' Dig. 48. 13. 9. 1.

The penalty of the lex Iulia peculatus was aquae et ignis interdictio,

qui ministerium eis ad hoc adhibuerunt vel qui subtracta ab his scientes susceperunt: alii vero, qui in hanc legem inciderint, poenae deportationis subiugantur. Est inter publica iudicia 10
lex Fabia de plagiariis, quae interdum capitis poenam ex sacris constitutionibus irrogat, interdum leviorem. Sunt 11
praeterea publica iudicia lex Iulia ambitus et lex Iulia repetundarum et lex Iulia de annona et lex Iulia de residuis, quae de certis capitulis loquuntur et animae quidem

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for which deportatio was substituted, Dig. 48. 13. 3, p. 143 supr.; but sacrilegi were capitally punished, Dig. ib. 9 pr. A fine of four times the value of the property appropriated seems to have been commonly inflicted for peculatus, perhaps under the lex Iulia itself, Paul. Sent. Rec. 5. 27. Peculation by judges was at first punished only by fine, for which death was substituted by Theodosius, 'cum vix par poena his possit flagitiis inveniri' Cod. Theod. 9. 29. 1. 2: cf. Cod. 9. 28.

§ **10**. The lex Fabia de plagiariis is referred to by Cicero, pro Rabirio 3, and there is a Title upon it in the Code (9. 20); its content is described by Ulpian in the Collatio, 14. 2 and 3 'lege Fabia tenetur, qui civem Romanum, eundemque, qui in Italia liberatus sit, celaverit, vinxerit, vinctumque habuerit, vendiderit, emerit, . . . eiusdem legis capite secundo tenetur, qui alienum servum invito domino celaverit, vendiderit, emerit dolo malo'; as to its penalties it is said in the same passage, 'et olim quidem huius legis poena numaria fuit, sed translata est cognitio in praefectos urbis, itemque praesidis provinciae extra ordinem meruit animadversionem: ideoque humiliores aut in metallum damnantur, aut in crucem tolluntur: honestiores, adempta dimidia parte bonorum, in perpetuum relegantur.'

§ **11**. The lex Iulia de ambitu was enacted by Augustus, Suetonius, Octav. 34: upon it Paulus says (Sent. Rec. 5. 30 *a*) 'petiturus magistratum vel provinciae sacerdotium, si turbam suffragiorum causa conduxerit, servos advocaverit, aliamve quam multitudinem conduxerit, convictus, ut vis publicae reus, in insulam deportatur'; in Dig. 48. 14. 1. 1 the ordinary penalty is said to have been a fine of 100 aurei.

The taking of bribes by judges and magistrates (repetundae) had been punished with death by the Twelve Tables, 'iudicem arbitrumve . . . qui ob rem dicendam pecuniam accepisse convictus est, capite punit' Gell. 20. 1. 7; a quaestio perpetua for the trial of this offence was established by a lex Calpurnia, Cic. pro Bruto 27. The ordinary penalty was a fine of four times the bribe taken, Cod. 9. 27. 1 and 6. 1; but in graver cases we read of relegatio, deportatio, and even death, Paul. Sent. Rec. 5. 28, Dig. 48. 11. 7. 3.

Upon the lex Iulia relating to repetundae Paulus says, 'iudices pedanei, si pecunia corrupti dicantur, plerumque a praeside aut curia submoventur, aut in exsilium mittuntur, aut ad tempus relegantur' Sent. Rec. 5. 28.

'Lege Iulia de annona poena statuitur adversus eum, qui contra

amissionem non irrogant, aliis autem poenis eos subiciunt, qui praecepta earum neglexerint.

12 Sed de publicis iudiciis haec exposuimus, ut vobis possibile sit summo digito et quasi per indicem ea tetigisse. alioquin diligentior eorum scientia vobis ex latioribus digestorum sive pandectarum libris deo propitio adventura est.

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annonam fecerit societatemve coierit quo annona carior fiat. Eadem lege continetur, ne quis navem nautamve retineat, aut dolo malo faciat, quo magis detineatur, et poena viginti aureorum statuitur' Dig. 48. 12. 2. Other penalties for the same offence were exclusion from the corn trade, relegatio, and condemnation to public works, Dig. 47. 11. 6 pr.

The lex Iulia de residuis was part of the larger statute noticed in § 9 supr. The offence was that of converting to one's own use public money entrusted to one for a specific public purpose, 'lege Iulia de residuis tenetur, qui publicam pecuniam delegatam in usum aliquem retinuit neque in eum consumsit' Dig. 48. 13. 2. The penalty was a fine amounting to a third of the money so converted; of course the principal sum had to be restored as well, Dig. ib. 4. 5.

EXCURSUS X

ON THE EARLIER HISTORY OF ROMAN CIVIL PROCEDURE.

A FAVOURITE subject of speculation with the political philosophers of the 17th and 18th centuries was the social condition of man in the remote ages anterior to his union with his fellows in the organization called the state, and the process by which this latter first came into existence, with all its paraphernalia of legislatures, judicial institutions, and political subordination. Upon the latter question they agreed, in the main, in holding the theory known as that of the 'Social Compact', though their respective political prejudices led them to differ largely as to the actual form of government in which the Compact historically resulted. The age was one in which *a priori* reasoning was in high repute, and their method was to disregard the facts of history, and to attach no importance to such knowledge of primitive societies as even they possessed: consequently, their doctrine has now been so universally discredited that modern thinkers find in it no value except 'as a convenient form for the expression of moral truths'. Upon the former question there was greater diversity of opinion. On the one hand man was represented as living in a golden age, of which universal peace, simplicity of manners, and freedom from the constant toil of modern society were the leading characteristics, apart from the absence of that restraint which is the inevitable accompaniment of law and political organization. On the other, his state was said to be one of internecine war with all around him; every man's hand was against his neighbour: the strong man armed alone was secure of life and property, and that only so long as no one stronger than himself appeared to try conclusions with him.

Though the latter of these theories is no less pure speculation than the former, it cannot be denied that it is largely supported by the actual evidence afforded us by primitive societies. As by the fossils which he finds at different depths beneath the earth's surface the geologist is enabled in some measure to reconstruct the natural history of past ages, so in the language of the Romans, as well as in their law, we find unmistakable testimony that, among the men from whom their race descended, and before the state yet existed even in embryo, the world, which we conceive as ruled by law, was ruled by

force, and by personal force alone each man's position was determined. Might, if not right, is at least her mother ; there being no state machinery for the protection of life and property, man has either to suffer his own effacement, or to keep with the strong arm that which he has won by his labour or his blood : and the essence of early ideas lies in the absence of any basis for right and law other than the individual consciousness, and the consequent necessity of self-assertion : 'in sich selbst trägt der Einzelne den Grund seines Rechts, durch sich selbst muss er es schützen.' [1]

Space does not allow us to cite more than a few of the most striking facts of law and language in support of this statement. Thus, the origin and true ground of dominium, or lawful control over objects of enjoyment, is placed by the Romans in the idea, not of mere occupation or peaceable discovery, but of 'taking' or forcible seizure : 'maxime sua esse credebant', says Gaius (iv. 16), 'quae ex hostibus cepissent' ; and perhaps the earliest term by which they denoted property (mancipium) at once arrests the attention, combining, as it does, with the idea of 'taking' another term, manus, which, as we shall see, is no less valuable evidence of primitive ideas ; property is that which is taken by strength of arm.[2] Precisely the same thought reappears in the early form of conveyance ; the property was deemed to pass not so much in virtue of the will of the parties, or of delivery by the one to the other, as by the 'taking' of the object by the latter (mancipatio) ; original is symbolized in derivative acquisition. Sir Henry Maine (Early History of Institutions, p. 253) refers to Mr. McLennan's work on Primitive Marriage, to show 'that a large part of mankind still simulate in their marriage ceremonies the carrying off the bride by violence, and thus preserve the memory of the reign of force which, at all events as between tribe and tribe, preceded everywhere the reign of law' ; that this was usual among the early Romans might have been conjectured from the legend of the rape of the Sabine women, and is expressly stated by Festus, who ascribes the custom to Romulus' success in thus providing himself with a wife. Even the gods were supposed to get their earthly ministers in much the same unceremonious manner ; the vestal virgin, says Gellius (i. 12. § 13), 'pontificis maximi manu prehensa ab eo

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[1] Ihering, Geist des römischen Rechts, i. p. 109. I am indebted to the following seventy pages of the same volume for many of the thoughts expressed in the early part of this Excursus.

[2] Cf. what is said on the distinction between res mancipi and res nec mancipi, p. 17 supr.

parente in cuius potestate est veluti *bello capta* abducitur'. The spear was the oldest symbol of right; hence there was no stronger title than purchase 'sub hasta', at a sale held by state authority; it was planted in the ground in the centumviral court, which had a special jurisdiction in questions of ownership: it appeared in the vindicatio or real action and its use in manumission per vindictam will occur to every reader. Property in land was never called anything by the Romans but praedium; the analogy with praeda, 'booty', suggests itself at once, and has been noticed by early writers, one of whom remarks 'antiqui agros quos bello ceperant ut praedae nomine habebant'. Again, the term manus, meaning primarily 'hand', and derivatively 'power', 'force', 'control', plays an extremely prominent part in early legal phraseology. Perhaps its frequency in procedure (e. g. manum conserere, manus iniectio) is due to the survival in judicial institutions of traces of an older system, namely, violent self-redress of wrong; but Sir H. Maine has observed (Ancient Law p. 317) that there is very strong reason for believing that manus was the ancient general term expressing power, whether exercised over flocks, herds, slaves, children, or wife: and there is an affinity between herus, 'owner', and the Greek χείρ, through the Sanskrit *hr*, which has the same meaning as the Latin root *cap*. On the other hand, while to denote man the Sanskrit and Greek agree (*nri*, *nara*, ἀνήρ), the Romans have discarded the corresponding word, and use 'vir', which in Sanskrit means 'warrior': they name him not from his sex, but from his calling and occupation: 'virtue' is conceived first and foremost as valour in war, only later as purity and honesty. The very name in which the Romans delighted, and which their satirists cast in their teeth—Quirites—may be taken as a final illustration: Quiris or Curis in old Sabine is equivalent to hasta; Quirites are 'spearmen': and thus we see how dominium ex iure Quiritium has a deeper meaning, as carrying us back to the prehistoric time when the strong man armed could alone possess his goods in peace.

In such a social condition the only mode in which a man who conceived himself wronged by another could obtain satisfaction was by taking the law, as it is said, into his own hands. A system of self-redress, in the form of private vengeance, preceded everywhere the establishment of a regular judicature[1]; the injured person, with his kinsmen or dependents, made a foray against the wrongdoer, and

[1] See Mr. J. L. Strachan-Davidson's Problems of the Roman Criminal Law, i. pp. 36–45.

swept away his cattle, and with them, perhaps, his wife and children, or he threatened him with supernatural penalties by 'fasting' upon him, as in the East even at the present day; or, finally, he reduced his adversary to servitude, or took his life. The idea of such a procedure was not compensation, but punishment; self-redress existed not so much rei, as poenae persequendae causa: [1] and as there is no objective standard of right and wrong, the measure of the injury, and therefore of the punishment, is the feeling of the injured person. Traces of this linger on in Roman Law throughout its whole history. It has been observed [2] that in settling the damages to be awarded the earliest administrators of justice took as their guide the measure of vengeance likely to be exacted by an aggrieved person under the circumstances of the case,[3] and that this is the true explanation of the very different penalties imposed by ancient law on offenders caught in the act, or soon after it, and on offenders detected after considerable delay. Even the later Roman law permitted the husband to kill with impunity the adulterer taken flagrante delicto, and distinguished the guilt of the thief according as he was caught in the act or not; the fur nocturnus was liable to the same penalty as the adulterer: for certain bodily injuries (Gaius iii. 223) the Mosaic law of retaliation had its counterpart at Rome. And from the 'addictio' of the fur manifestus and the insolvent debtor, and the commonness of noxal surrender (Gaius iv. 75-79, Bk. iv. 8 supr.) in international no less than in private relations, Ihering conjectures that a form of self-redress especially favoured by usage was the seizure and detention of the person of the wrongdoer, until he was ransomed by his friends, or had earned by the sweat of his brow his own liberation.

From a comparison of the different communities in which we know this system of self-redress to have prevailed, or even to obtain at the present day, it would seem that there are two alternative connecting links, as it were, between it and the later remedial process of advancing civilization. The practice of uncontrolled private vengeance, extending even to life and limb, dwindles everywhere to one of the various forms of distraint; the survival, as at Rome, of a limited right of personal arrest and detention seems abnormal. From this point,

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[1] For the prominence of 'penalty' in primitive law see Ihering i. p. 126, Maine, Ancient Law p. 368 sq. Cf. Mr. Justice O. W. Holmes' Common Law p. 2 sq.

[2] Maine, Ancient Law pp. 378, 381.

[3] Cf. the sentiment of Cleon in Thuc. iii. 38 *ἀμύνασθαι δὲ τῷ παθεῖν ὅτι ἐγγυτάτω κείμενον ἀντίπαλον ὂν μάλιστα τὴν τιμωρίαν ἀναλαμβάνει.*

however, we find a well-marked divergence. One alternative 'consists in tolerating distraint up to a certain point: it is connived at so far as it serves to compel the submission of defendants to the jurisdiction of courts, but in all other cases it is treated as a wilful breach of the peace. The other is the incorporation of distraint with a regular procedure. The complainant must observe a great number of forms at his peril, but if he observes them he can distrain in the end.'[1] The first step, we may say, in the process by which self-redress slowly yielded to the encroachment of courts of justice was the gradual development of a body of custom, in some cases extremely bulky, precisely defining the conditions under which it might be exacted, and minutely prescribing the proper stages in the process, without the due observance of which the complainant must altogether lose his remedy. Notice of the intention to distrain—fasting upon the wrongdoer—attendance of witnesses—allowance of a 'stay' or interval between the earlier and later steps—and many other formalities are, or may be, the essential conditions of success. Such limitation by custom of the right of self-redress—in other words, its 'incorporation with a regular procedure'—is most common in societies, such as that of the Irish as revealed to us in the Brehon law tracts, in which, even if there be a judicial system at all, its action is weak and intermittent, or where 'courts of justice exist less for the purpose of doing right universally than for the purpose of supplying an alternative to the violent redress of wrong.' But 'the Roman tribunals became the organs of the national sovereignty at an exceptionally early date, and the development of Roman law and procedure was exceptionally rapid'; consequently, we are enabled to bridge over the gulf between the primitive system of private vengeance, and the earliest Roman civil process of which we have any knowledge, less by tracing this gradual incorporation of self-redress with a regular procedure than by other indications of more advanced ideas. These in the main are three in number: the introduction and development of the idea of composition for injury; the plan of guaranteeing a man's rights by collective action through witnesses; and the contractual decision of disputes.

i. There can be little doubt that the term 'poena' originally meant not so much penalty as composition for injury; the earliest poenae were sums in consideration of which the injured person consented to forgo his customary right of self-redress, and the penal sums recovered by the plaintiff in a Roman action on delict attest the nature

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[1] Maine, Early History of Institutions p. 278.

of the practice, though in them the ' penalty ' is usually fixed by the state, and not by the parties.[1] This less barbarous method of settling disputes and claims is familiar to every one who has any acquaintance with the law of the Germanic tribes. Mr. Kemble observes[2] that under Anglo-Saxon law there was hardly any wrong a man could suffer which could not be atoned for by a money payment. At Rome, so far as we can judge, it was confined to delict; for breach of contract the ultimate remedy, even in historical times, remained the right of arrest and detention; the debtor who could not, or would not, discharge his obligations fell a victim to the severe process of manus iniectio; he was sold into foreign slavery, or put to death. Thus ' the remedy for a wrong to property was against the person: for a wrong to the person it was against the property ', and this explains why actions on delict, even when partly rei persecutoriae, ' in heredem non dantur '. A delict calls for the exercise of private vengeance, which, however, has nothing to act upon as soon as the wrongdoer is dead; his heir succeeds to his universitas iuris, of which his feuds and hostilities are no part; and, as the poena is paid as the price of exemption from personal hostility, it must be paid by the wrongdoer and no one else.

ii. It is obvious that the exercise of self-redress required some limitation, as anarchy began to give way to order, providing for the establishment and settlement of claims of man against man. In the case of a wrong or a debt whose existence no one could doubt, the system might, as things stood, seem tolerable enough; but it could not long be endured if every pretended injury or obligation were to entitle the complainant to proceed thus against the object of his animosity. The expedient which seems to have suggested itself to the primitive Romans was to require clear and adequate evidence of every right or wrong which was not otherwise beyond question, and to attribute to the witnesses a kind of interest in the realization of justice, by identifying them, in a sense, with the person who was supported by their testimony; if the latter were compelled to resort to self-redress, they were under a moral obligation to afford him active assistance; in default they became no less improbi and intestabiles than the false or recalcitrant witness of a mancipation.[3] A ' testis ' is conceived, originally, less as a witness, in the modern sense, than as a ' guarantor ' or ' insurer ' of the right which he has

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[1] In the delict of iniuria, where the praetor substituted a money payment in lieu of actual retaliation, the plaintiff was allowed to fix its amount himself, Gaius iii. 224.

[2] Anglo-Saxons i. 177.

[3] Gellius xv. 13. 11.

attested—a conception which we shall be the better able to realize by remembering the *judicial* character of the recognitor in the Assizes of Henry II— ; verum means 'the assured', truth, that for which one becomes security ; the witnesses, who in the legis actio are called upon 'litem contestari', discharge, upon this theory, some intelligible function.[1] Why, we may ask, could a woman not be a witness to the transactions of the ius civile ? The answer would seem to be, because she lacks the physical force of man to which the witness must in the last resort appeal, if he is really to do his duty as 'assurer'. Why, again, could many of a man's own relations, whose evidence might incur suspicion on the ground of interest, attest his solemn acts and dispositions ? Because *credibility* is not, as with us, the essential ; the essential is rather the strong arm. Joint responsibility for wrong is familiar to readers of Greek legend no less than of Anglo-Saxon history ; joint suretyship for right—the idea of inducing a wrongdoer to submit to justice by the moral and physical force by which his adversary is backed—is peculiarly Roman. A strong confirmation of this theory is found in the will made in the comitia calata ; a disposition which it was desirable should be guaranteed by a larger force than any ordinary matter, because it was of far greater importance, affected, perhaps prejudicially, more interests, and therefore was more likely to be impeached, and exposed to the chances of stronger opposition : accordingly, it was witnessed, and so guaranteed, by the whole Roman populus, and even when in the will made per aes et libram the number of witnesses was reduced to five, these, according to a very plausible theory, represented the whole people in its five census-classes.[2] If this conjecture be true, the form of mancipation was an easy and convenient means of throwing round dispositions the aegis of a public guarantee : violation of a right acquired per aes et libram is a violation of public order : resistance to the person entitled is resistance to the state.

iii. The contractual decision of disputes took two forms. The one consisted in the complainant giving his adversary the option of denying his liability on oath, or of being taken, in default, to admit it : it remained a permanent institution at Rome even to the time of Justinian, in whose Digest (12. 2. 38) we read 'manifestae turpitudinis et *confessionis* est nolle nec iurare nec iusiurandum referre'. The other was reference of the matter by common consent to arbi-

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[1] Cf. the affinity in German between wahr and bewahren, gewähren.

[2] This is rejected by Girard, 4th ed. p. 285, note 4.

tration : from this, beyond the shadow of a doubt, the whole Roman system of actions tried before a judge or judges took its origin. The earliest judges derived their judicial authority, such as it was, not from the state, but from the voluntary submission of the parties : and Sir H. Maine has shown,[1] by an examination of the earliest Roman civil process, that the magistrate, even when commissioned by the state for the administration of justice, preserved the memory of the actual historical source of his functions by ' carefully simulating the demeanour of a private arbitrator casually called in '. The later Roman jurists, though struck by the similarity in procedure between an ordinary action and a reference to arbitration, were guilty of the curious anachronism of deriving the latter from the former : ' compromissum ' (one of them says) ' ad similitudinem iudiciorum redigitur ' ; but the fact is that action grew out of arbitration, and the judge was originally only an unofficial referee ; a fact of which traces are observable throughout the legal history of Rome. Thus, no action could validly be commenced, still less carried through to judgment, until the court had got both parties before it : for arbitration can take place only by consent, not by a unilateral act of either of them without the other. Still more forcibly are we reminded of the mode in which the early judge acquired his jurisdiction by the vitality of the rule that no judge could be forced upon a party of whose knowledge and integrity he was not satisfied : ' neminem ', says Cicero,[2] ' voluerunt maiores nostri non modo de existimatione cuiusquam, sed ne pecuniaria quidem de re minima esse iudicem, nisi qui inter adversarios convenisset.' Hence too the limited authority, as we should deem it, of the Roman iudex ; he has no ' imperium ' ; he cannot compel the parties to any act or forbearance ; he is merely a referee whom they have chosen, and in whose appointment the magistrate has co-operated ; all he has to do is to decide the questions submitted to him, so far as the parties may enable him ; he has to leave to them the realization (by execution) of the right he ascertains. The very point he has actually to settle is at first kept studiously in the background, and hidden behind a wager ; the decision is not an order or injunction, but an expression of opinion, sententia, pronuntiatio.

In England we know from actual records with what rapidity trial by jury in civil causes, though in most cases optional only, super-

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[1] Ancient Law pp. 375 sqq. [2] Pro Cluentio cap. 43.

seded the more barbarous methods of compurgation, ordeal, and trial by battle, and that this was largely due to a sense of the greater justice and reasonableness of the new system. We can hardly doubt that upon much the same grounds the practice of arbitration daily gained greater favour among the Romans. When political authority has at length obtained a firm footing, the magistrate is gradually preferred by litigants to a citizen arbitrator, perhaps from a conviction of his greater wisdom and impartiality ; if he is a king, perhaps too because his divine descent is believed to confer upon him a sense of right, and a kind of knowledge, above his merely human fellows. Finally, the judicial function is recognized as appertaining to the state ; though the primitive remedies may to some extent survive in all their rudeness, and though the state administration of justice may still more widely bear traces of the social condition which preceded political organization, still the natural mode of deciding a dispute is to go to the magistrate, and rules of civil procedure have begun to assume consistency. Courts have become established ; their mode of action is prescribed by law ; any attempt to evade their authority by recurring to other methods of obtaining satisfaction, save in certain well-defined cases, is considered a defiance of law, and a breach of the peace.

This is the condition of the earliest judicial institutions at Rome of which we have any information. Gaius tells us that the formulary procedure which was in use in his time had superseded a system of 'Statute-Process', which presents to us all the characteristic features of a nascent judicature. There were but five forms of redress for wrong, called legis actiones, a name which denotes both the solemn forms of words which had to be uttered by the parties before the praetor, and the different forms of procedure, and of which two alternative explanations are given by Gaius (iv. 11). Three of these are genuine actions ; the other two are anomalous, for, though called 'actiones', they are clearly 'survivals' from the older system of self-redress, and seem at first sight to have little in common with an action in the ordinary sense of the word : 'they cannot' (says Sir H. Maine) 'be made to square in any way with our modern conception of an action.' One of these is pignoris capio, which Gaius (iv. 29) says some refused to regard as a legis actio at all, among other reasons because of its extra-judicial character. In point of fact, it is the old practice of distraint, restricted by the encroachments of a more civilized process to certain limited kinds of claims of a public or religious nature, and even then to be successfully applied

only by careful observance of prescribed forms of speech and action.[1] It could be used by a soldier against the tribunus aerarius for arrears of pay,[2] and by the cavalry in order to procure money for the purchase of a horse and his corn (aes equestre, aes hordearium) from the persons liable by law therefor ; its employment in these cases was anterior to all records (Gaius iv. 26). By the Twelve Tables the buyer of a victim for sacrificial purposes, and the hirer of a beast of burden let out to raise money for the same object, were made liable to distress for the purchase or hire money, and the 'lex censoria' enabled publicani to proceed in this manner against persons who were in arrears of taxation. Of the procedure we know nothing: from the limited action of the remedy it may perhaps be conjectured that very little was left to the caprice of the distrainor, and that both notice and an interval for redemption of the property seized were requisite. The other abnormal legis actio was called manus iniectio, which seems properly to have been the mode of execution upon a liquidated debt, and so available only in the case of debtors who had either admitted their liability (confessi) or against whom a judgment had been obtained (iudicati). The procedure consisted in the creditor's 'laying hands' on his debtor wherever he met him, taking him before the praetor, and there solemnly stating the debt, non-satisfaction, and arrest (Gaius iv. 21). Thereupon, unless the debt was at once discharged by the debtor, or formally contested by some one on his behalf, the creditor was entitled to take him away and keep him in strict detention, and after the lapse of a prescribed period to sell him into foreign slavery or put him to death.[3] Subsequently, manus iniectio was extended in all its severity by statute to certain other claims ; in particular, it was allowed by the lex Publilia to the sponsor against his principal, in default of repayment within six months, and by the lex Furia de sponsu against the creditor who exacted from one of several sureties more than his aliquot share of the debt guaranteed. As thus extended it was called manus iniectio pro iudicato. In other cases again it was applied by statute with a mitigation of its harshness, the debtor escaping imprisonment by being allowed to contest his liability by action in person ; in this less severe form it was called manus iniectio pura ; instances of its use will be found in Gaius iv. 23. We read too of manus iniectio under

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[1] Girard, 4th ed. p. 977, dissents from the view that it was a survival of distress by individuals, and regards it as a delegation by the state of its power of satisfying its own claims by distraint.

[2] Cf. Maine, Early History of Institutions p. 305. [3] Cf. Poste's Gaius p. 326.

other circumstances than any of these, especially in execution for contractual obligations incurred by nexum, and apparently in furtum manifestum (Gaius iii. 189): and very often it is impossible to say whether the procedure was pura or pro iudicato. But the lex Vallia (Gaius iv. 25) eventually limited the operation of manus iniectio in all its original severity to the cases of iudicatus (including confessus) and of the defaulting debtor under the lex Publilia; wherever else it was still available it was pura, and its only peculiar incident was that the debtor was cast in double damages if he unsuccessfully denied his liability (lis crescens).

The Romans themselves never doubted that manus iniectio was a true legis actio, though it was no less a form of execution than pignoris capio: the former was Personal, the latter was Real execution. The fact would seem to be, as is remarked by Mr. Poste,[1] that manus iniectio has two meanings. Sometimes it is a solemn act of self-redress, viz. where the plaintiff's right is incontestable, and the defendant submits. But at other times it is the first stage in a legis actio, viz. where the defendant denies his liability, and resists the claim either in person or through a vindex: and it seems probable that it was called Statute-Process only in this latter case. If this be true, the application of the term 'legis actio' to pignoris capio alone remains anomalous. So far as we know it, pignoris capio was purely extra-judicial: if a man had a claim which the law allowed him to enforce in this manner, he had no need of assistance from the magistrate; the praetor did not appear at any stage of the proceedings, which presented a picture of as pure self-redress as could be found before courts and magistrates had come into existence. Why then is it called an 'actio' at all? Arguing from the analogy of manus iniectio, it would not be rash to conjecture that pignoris capio also has two meanings, and that it was a legis actio only when the person distrained upon denied his liability, and pushed proceedings to a regular action. It is well known that in the English law of Distress this is done by an action of Replevin, in which the distrainee is plaintiff and the distrainor defendant: but the parallel of manus iniectio makes it probable that in Roman law the *rôles* were reversed, and that if the distress was alleged to be unlawful the distrainor was bound to come forward as plaintiff in an action to justify his act, by forcing the other to redeem his pledge at a price double the amount of the original debt.[2]

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[1] Gaius p. 479.

[2] This conjecture is supported by the known facts of the publicanus, who was

Of the three other legis actiones it seems probable that the oldest is the sacramentum. Gaius says it was ' actio generalis ', i. e. the proper remedy in all cases for which no other procedure had been ordained by statute. Though he describes it to us as a real action, involving questions of ownership and status, it may be conjectured that it was at one time the only form of action proper known to the Romans ; for, of the two other legis actiones which we have still to examine, we know one to have been of later introduction, and to have related to cases which previously were tried by sacramentum (Gaius iv. 20) ; while the comparative freedom of the other from the strict punctiliousness characteristic of very early procedure seems to justify us in denying it any very great antiquity.[1] All three, however, being actions proper, necessitated the attendance of both parties before the magistrate, and to secure this was the business of the plaintiff. A summons from the court or magistrate, which we now regard as the indispensable mode of commencing legal proceedings, was at Rome unheard of for many centuries. The first words of the Twelve Tables which have survived to us prescribed the mode of dealing with a defendant who refused to attend to his plaintiff's summons or ' in ius vocatio ' ; the latter, after appealing to witnesses, could lay hands upon and take him by force before the praetor. The ' Real ' form of sacramentum is familiar to every reader of Sir Henry Maine's Ancient Law. It may be said to consist of three dramatic acts or stages, the first of which presents to us an oral pleading or altercation. The subject of dispute, e. g. a slave—or, if it be too large, a portion of it—is brought into court : whereupon the plaintiff, holding in one hand the festuca, or symbol of absolute dominion, grasped it with the other, and touching it with the festuca said ' hunc ego hominem (e. g.) ex iure Quiritium meum esse aio secundum suam causam sicut dixi : ecce tibi vindictam imposui '. This form was repeated by the defendant ; and, both now grasping the object of their dispute, we reach the second act of the drama, a pretended trial by battle, symbolized in this simultaneous seizure or ' manuum consertio '. Lastly, to avert the simulated prospect of bloodshed, the state steps in ; the praetor, in the phrase ' mittite ambo hominem ',

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allowed to proceed on the analogy of pignoris capio after the introduction of the formulary system : and Gaius' words (iv. 32) suggest that the publicanus sued the taxpayer who was in arrears in order to compel him to redeem the property seized at a sum in excess of that actually due. Cicero speaks (in Verrem iii. 11. 27) of ' publicanus petitor ac pignerator '.

[1] Keller, however (Civil Process p. 77), regards iudicis arbitrive postulatio as coeval with sacramentum.

turns actual strife into peaceful arbitration. The plaintiff now demands of the defendant the ground of his claim, and having heard it challenges him to lay a wager, the amount of which was fixed by the Twelve Tables, on its justice ; a challenge which is repeated by his adversary. It is from the stake in this wager (sacramentum) that the action got its name ; it was forfeited by the loser to the aerarium, and originally was deposited, pending trial, 'in sacro', under the custody of the gods [1] ; subsequently immediate deposit was dispensed with, the praetor taking security (praedes sacramenti) from both parties for payment in the event of defeat. The wager having been thus duly laid, the praetor proceeded 'vindicias dicere', to award interim possession to one or other of the litigants, taking sureties (praedes litis et vindiciarum) for the restoration of the property in dispute, and its mesne profits, if the other proved his title. Unless the case was one over which the centumviral court had exclusive jurisdiction, a iudex was then appointed by agreement to try the question at issue, namely, which was the winner of the wager : behind which the real matter in litigation—the ownership of the slave—lay in the background. Before this judge the case was first laid in a succinct narrative form (causae collectio), which was followed by evidence and arguments in detail.[2]

Both the remaining legis actiones are in personam. Of iudicis arbitrive postulatio we have no records, save the formula, preserved by Valerius Probus, in which the judge or referee was applied for. But it seems to have been a sort of modification of the sacramentum, designed for the settlement of unliquidated claims. The employment of sacramentum itself was conditional upon the applicability of the wager, and this clearly depended on precise knowledge of the pecuniary value of that which was claimed by the plaintiff. In other words, sacramentum, as an action in personam, lay only on literal contracts, on such stipulations as were for a certum, and on delicts

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[1] Danz, Karlowa, Cuq, Girard and others account for the name by supposing that originally an oath was taken by both parties as to the justice of their respective claims, and regard the forfeiture of the wager as a punishment for the perjury. Upon the whole subject of sacramentum see Mr. J. L. Strachan-Davidson's Problems of the Roman Criminal Law, i. pp. 46–66.

[2] For the significance of wagers in early judicial proceedings see Maine, Early History of Institutions p. 259.

The procedure in sacramentum after the praedes litis et vindiciarum had been taken is very obscure, owing to a lacuna in the MS. of Gaius, iv. 15. Before the enactment of the lex Pinaria Gaius says (iv. 15) that a judge was appointed to try the case at once : but that statute required the parties to appear before the praetor for that purpose after an interval of thirty days.

in which the pecuniary penalty was fixed by law; and iudicis arbitrive postulatio seems to have been the remedy on fiducia (if at this time actionable at all) and on certain quasi-contractual relations, in which the plaintiff demands, not something ascertained, but that it shall be ascertained to what he is in equity entitled from his adversary.[1] Of condictio we have fuller knowledge. It is said by Gaius (iv. 19) to have been established by the lex Silia[2] for the recovery of liquidated money claims, and to have been extended later by the lex Calpurnia to res certae of all other kinds. He adds that the reason of its introduction was hard to see, there being already a satisfactory remedy in such cases, viz. the sacramentum in personam. One possible explanation is the increase in judicial business. If the lex Pinaria had not yet been enacted, and Keller's account of it is the true one, we may ascribe the introduction of condictio to a desire to relieve the centumviri of a number of suits which could very well be tried by a single judge; and, even if that statute were already in existence, it perhaps only made reference of the cause to a single iudex optional to the praetor, whereas the lex Silia absolutely required him to send condictiones to be tried in this manner. It is not improbable, however, that the condictio was really designed in the interests of creditors and the money-lending class, to whom, as will be seen, it was far more favourable than the older procedure by sacramentum.[3] In its earliest form it lay only for the recovery of pecunia certa credita—money lent, or promised by a stipulation, or due under a literal contract; and in these cases the plaintiff, having got the defendant before the praetor by in ius vocatio, challenged him to a wager by stipulatio (sponsio poenalis) of a sum equivalent to a third of the sum in dispute, while the defendant, by restipulatio, bargained for payment of a similar sum by him in the event of his failing to establish his case. This wager did not go, like the sacramentum, to the state, but to the party victorious in the action. Then followed the 'condictio'

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[1] E.g. the actio tutelae and the actio familiae erciscundae. See Voigt, xii. Tafeln i. § 62. This is the point of contact between this legis actio and the later bonae fidei iudicia. The equitable balancing of conflicting claims seems to be characteristic of both.

[2] Voigt (Ius Naturale iv. 401) believes that it was through the introduction of condictio that stipulation acquired binding force, and dates it between 443 and 425 B.C. The lex Calpurnia he places between 338 and 288 B.C.: but other writers consider them to have been much later, and there is no reliable evidence on the matter at all.

[3] So too Professor Muirhead, Roman Law p. 231. For another explanation see Maine, Early History of Institutions p. 260.

proper,[1] viz. notice by the plaintiff to the defendant to reappear after an interval of thirty days for the appointment of a iudex to try the case, the subsequent procedure being much the same as in sacramentum. It does not seem that the sponsio and restipulatio, by which the wager 'tertiae partis' was entered into, ever formed part of the condictio to recover 'certa res', which was subsequently called condictio triticaria.

The defects of the legis actio procedure in general lie upon the surface. Gaius (iv. 30) refers only to its 'nimia subtilitas' or excessive formalism. Things came, he says, to such a pass, that he who committed the smallest error failed altogether. Sir H. Maine [2] cites a passage of Blackstone in which precisely the same remark is made of the English law of Distress, and which is curious, as he says, because the later of the two writers could not possibly have read the earlier. It was not so much the 'nimia subtilitas' as the lack of safeguards against errors of form which gave the legis actio its two-edged character. Any such error, however trivial it might be, entailed complete and irrevocable loss of action, for the maxim 'nemo de eadem re bis experiri potest' forbade the bringing of a second suit: and yet the chances of such mistake were so innumerable, the path of the litigant was so beset with the pitfalls of formalism, that justice must have been only too often defeated. Thus, in manus iniectio, and pignoris capio, the proceedings took place to a large extent, if not entirely, out of court; and yet the slightest slip, even in an ignorant creditor, brought upon him irremediable defeat. In the succeeding system, as is remarked by Mr. Poste,[3] no litigant could commit a suicidal error before the final moment at which the suit was transferred from praetor to iudex. In the same note he calls attention to the rigidity of Statute-Process—its want of power of expansion. The forms of action were crystallized in the law, and incapable of multiplication; the right presupposed the remedy, not the remedy the right; the praetor himself had his hands tied, and was a mere piece of machinery. A new order of things was inaugurated by the lex Aebutia.[4]

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[1] Gaius iv. 18 'et haec quidem actio proprie condictio vocabatur: nam actor adversario denuntiabat, ut ad iudicem capiendum die xxx adesset'. For the employment of the oath in condictio see note on Bk. iv. 6. 11 supr.

[2] Early History of Institutions p. 273.

[3] Note on Gaius iv. 30.

[4] For the date of the lex Aebutia see note on p. 30 supr. The only passages in which the statute is mentioned are that of Gaius, referred to above, and one of Gellius (xvi. 10). In the latter the writer is investigating the meaning of the word proletarius borrowed by Ennius from the XII Tables: and a friend, deeply versed

We are told by Gaius (iv. 30) that owing to their unpopularity the legis actiones were for the most part [1] swept away by this statute and two leges Iuliae, and that actions tried by formula took their place. As there was an interval of probably quite a century between the lex Aebutia and these two laws of Augustus, it is by no means clear what share in the result is to be attributed to the earlier and the later enactments respectively. Trials of actions by formula seem to have been in vogue in the provinces, if not in the courts established by the praetor peregrinus, and the opinion of most recent writers on the subject is that the lex Aebutia merely authorized the praetor urbanus to direct the trial in a similar manner of any action between Roman citizens which required the appointment of a iudex (which was not the case with those which fell within the jurisdiction of the centumviral court), the parties having the option between this procedure and that by legis actio. According to this view, the leges Iuliae gave the death-blow to the legis actiones, which had practically gone quite out of use except ' in centumviralibus iudiciis ', by enacting that the formulary process should be compulsory wherever it had previously been optional.[2]

The new system has two leading features. One is the division of nearly every judicial proceeding or action into two portions, one which took place before the praetor, in iure, and the other which took place before the iudex, in iudicio. We have seen the growing tendency towards this in the legis actio period. So long as litigation was tolerably scanty, we may, perhaps, believe that the praetor decided many suits in person, but the lex Silia made reference to a single judge obligatory in a large class of actions, and an impulse must also have been given to the practice by the introduction of

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in the civil law, tells him that, like many other words there used, it had become obsolete since the lex Aebutia, except in legis actiones tried in the centumviral court.

[1] Thus even after the leges Iuliae the legis actio procedure continued to be followed (1) in the centumviral court, where actions were tried by sacramentum as late as the reign of Diocletian ; (2) in the so-called voluntary jurisdiction, such as datio in adoptionem and in iure cessio generally, and manumissio vindicta ; here also the proceedings were by sacramentum, and took place entirely in iure, there being no necessity for the appointment of a iudex ; (3) in damnum infectum (note on Bk. iii. 18. 2 supr.), where the better opinion is that the legis actio followed was pignoris capio : see Sohm, Institutionen, § 36, note 9 (p. 172 in the English translation by J. C. Ledlie).

[2] Cuq (Institutions juridiques des Romains i. p. 714) suggests that the lex Aebutia permitted the praetor urbanus to direct the trial by formula only of condictiones, the object being to save the plaintiff in actions of debt from the inconvenience of waiting the thirty days which the lex Silia had interposed between the proceedings in iure and the appointment of the iudex (Gaius iv. 18).

iudicis arbitrive postulatio. But after the lex Aebutia the distinction between ius and iudicium is strongly emphasized, the latter acquiring more prominence as the former became less formal. The main object of the proceedings in iure, as of the pleadings in an English action, was to determine the issues to be tried; their actual trial took place in iudicio. The other and more characteristic feature of the new system is the commencement of the action, after summons and appearance, by a written document (formula, concepta verba) addressed by the praetor to the iudex who was to try the action, and containing his authority, and a brief statement of the issues, with sometimes the principle upon which he was to decide them. The praetor stated in his Edict the circumstances under which he would grant an action, e. g. 'if Aulus assaults Titius, or if Titius refuses to repay a loan given him by Seius, *iudicium dabo*'; and the skeleton of the formula was taken from the Edict, or from some special department of it known as the album, and filled out with flesh and muscle from the allegations of the parties. It was no part of the praetor's duty to construct the formula. It was incumbent on the plaintiff to see that it contained every word and letter which was essential to his case; it was the defendant's business to see that any defence which he had, and which by technical rules of pleading was required to be referred to in the formula, should there be alluded to accordingly. In a word, the skilful 'building up' of a perfect formula was a task of much nicety, in which a litigant frequently required considerable technical assistance. When the parties had finally agreed upon its structure, it was 'settled' by the praetor, and the business in iure was over. Thus the formula might, and usually did, contain a number of clauses, some of them due to and containing, as it were, the case of the plaintiff; others due to and to a certain extent containing the defence of the defendant.

At the head of the formula stood the appointment of the iudex; e.g. Aulus Agerius iudex esto.[1] The other possible portions, though

[1] For purposes of convenience it is assumed that the case is sent for trial before a single iudex. Often, however, it was heard by a number of iudices sitting together, who were then called recuperatores; it is quite uncertain what kinds of cases were usually treated in this manner, but it is known that the procedure was more expeditious than that before a single iudex: see Mr. J.L. Strachan-Davidson's Problems of the Roman Criminal Law, i. pp. 211–224. It is hardly necessary to warn the reader against confusing the Roman iudex with an English judge. The former was merely a private citizen, appointed by the praetor after amicable selection by the parties, to determine certain issues of law and fact in accordance with the evidence laid before him. Towards the end of the republican period the office, which had previously

never all found together, usually followed in much the same relative order. We will first examine those inserted in the interest of the plaintiff.

The Demonstratio, when found in a formula, immediately follows the appointment of the iudex, and contains the allegation of fact[1] upon which the plaintiff bases his claim. It invariably begins with 'quod', 'whereas'; e.g. in Gaius iv. 39 'quod Aulus Agerius Numerio Negidio hominem vendidit'; or 'apud Numerium Negidium hominem deposuit'. Occasionally the place of the demonstratio is taken by a praescriptio (pro actore), and sometimes even the latter is prefixed to or worked into the former; its use is confined to formulae upon actions in which the plaintiff is entitled from the defendant to a number or variety of acts prima facie hanging together, but of which one only, or at least not all, are claimed in the present action. By the praescriptio, beginning 'ea res agatur, let the present trial relate exclusively to so and so', the plaintiff reserved his right of action upon the other acts, or those subsequently to fall due, which would otherwise have been consumed; it being a presumption of Roman law (capable, however, of being rebutted by the insertion of a praescriptio in the formula) that when a man instituted an action it comprised all his claims against the defendant, prospective no less than present, so far at any rate as they related to the present ground of action, and already had at least a potential existence. Two examples are given by Gaius. In the one, a man to whom an annuity is payable, say, every six months, sues for a half-year's instalment, using the praescriptio 'ea res agatur cuius rei dies fuit'; in the other, the purchaser of an estate, claiming that it shall be conveyed to him by mancipation, reserves to himself the right of subsequently demanding its mere traditio by a praescriptio in the form 'ea res agatur de fundo mancipando'.

The Intentio, which follows the Demonstratio if there be one, is the part of the formula 'qua actor desiderium suum concludit', in which the plaintiff either affirms the legal right which he claims against the defendant, or else states a fact or facts (in which latter case there is never a demonstratio) from which the right is to be inferred. It is easily to be distinguished from the other parts of the

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been thought an honour, came to be regarded as a burden; and this led to the institution by Augustus of an 'album iudicum selectorum', from whom the judge had to be chosen, and who were compellable to hear cases sent to them by the praetor.

[1] Or perhaps rather, as Girard puts it, 'la cause du droit allégué par le défendeur' (demandeur ?).

formula by the term paret (si paret, quicquid paret) ; and if it affirms a right it is said to be ' in ius concepta ', if it merely implies a right by directing the judge to decide for or against the plaintiff according as he finds certain alleged facts to be true or untrue it is said to be ' in factum concepta '. The numerous divisions of Roman actions found in the fourth book of Gaius are based almost entirely on the structure of the intentio ; for, this being the part of the formula in which we find, expressly or by implication, the right alleged by the plaintiff, it is by reference to it that we are enabled to distinguish actions according to the rights which they are designed to protect. If the intentio of one formula differs substantially in structure from that of another, we know at once that the actions themselves, and the rights which they respectively protect, are substantially different as well.

The principal divisions of actions, so far as they arise from differences of structure in the intentio, are as follow.

i. The intentio is either directed against the person of the defendant, and names him as well as the plaintiff (e. g. si paret *Aulum Agerium* Numerio Negidio sestertium x millia dare oportere), or it merely specifies the object to which the plaintiff's claim relates and names the plaintiff only (e. g. si paret Auli Agerii hominem, fundum, hereditatem, ius utendi fruendi, esse). In the first case the action is in personam, and brought to enforce an obligation ; it is called ' actio ' *κατ' ἐξοχήν* (p. 346 supr.). In the second case it is in rem, and asserts either ownership or a ius in re aliena as belonging to the plaintiff ; its specific name is vindicatio or petitio. A real action claiming a servitude was called actio (in rem) confessoria ; one denying the right of another person to a servitude was called negativa or negatoria.

ii. Actions in personam lie for the enforcement of an obligation. Of the formulae of those brought upon delict little is known :[1] but those which were in ius conceptae and lay on contractual or quasi-contractual relations fall into distinct and familiar classes, viz. iudicia stricti iuris and iudicia bonae fidei. The intentio of both can always be recognized by the presence of the word ' oportet ' or ' oportere ' (' is bound '). Iudicia stricti iuris include condictiones : the cases in which the latter were the appropriate action are pointed out in the note on p. 551 supr.[2] So far as the intentio is concerned, they are of three kinds, viz. (*a*) condictio certi, which corresponds

[1] Some evidence as to the actio furti is found in Gaius iv. 37.

[2] The actio ex testamento, on a legacy creating an obligation, and the action ex stipulatu, though stricti iuris, were not condictiones : Girard, 4th ed. p. 611, note 1.

tolerably closely with the old legis actio introduced by the lex Silia: it lies for the recovery of certa pecunia. The intentio ran 'si paret A. A.: N. N. x. millia sestertium dare oportere': and if the claim was for pecunia certa *credita* (i. e. due under a mutuum, a verbal or a literal contract) there might be a wager (sponsio and restipulatio poenalis) between the parties amounting to one third of the sum in dispute (Gaius iv. 171). (*b*) Condictio triticaria (which derives its name from triticum, grain, a loan of which no doubt in early times most frequently gave rise to it) corresponds with the legis actio as extended by the lex Calpurnia: it lies for the recovery of certae res (Dig. 13. 3), and its intentio runs 'si paret A. A.: N. N. fundum [hominem, tritici x modios] dare oportere'. (*c*) Condictio incerti is the remedy where the obligation is to perform some act other than a conveyance; the formula contained a demonstratio, and the intentio ran 'quicquid dare facere . . . . oportet'.

The bonae fidei iudicia, which are sometimes called arbitria[1], are enumerated in Gaius iv. 62, Bk. iv. 6. 28 supr., the most common of them being the actions on contracts iuris gentium exclusive of mutuum. The name is derived from the addition of the words 'ex fide bona' in the intentio (e. g. quicquid ob eam rem A. A.: N. N. ex fide bona dare facere oportet), which indicate that the plaintiff's demand is of something more 'incertum' even than in condictio incerti: its value is to be ascertained only by a careful balancing and adjustment of conflicting claims, and consequently the judge is here allowed a far greater latitude of discretion; the procedure is that of equity rather than of law.[2]

iii. Another division of actions based upon structural difference of intentio is that into actio directa and actio utilis, which grew out of the practice of extending an action to cases which did not come within its original scope by the introduction of a fiction into the intentio, whereby the iudex was instructed to decide the case as if the conditions under which (in ordinary circumstances) the action would lie existed, whereas in point of fact they did not. Such an action was called actio fictitia, and is described by Gaius as one 'quae ad aliam actionem exprimitur', i. e. which is moulded upon a pre-existing and independent remedy, the latter being said 'sua vi ac

[1] The term arbitrium in Roman law, in the sense of an action, means either an actio arbitraria, p. 560 supr., or a bonae fidei iudicium; and the person who tries an action of either of these classes is called arbiter as often as iudex.

[2] For the principal specific points of difference between stricti iuris and bonae fidei iudicia see on Bk. iv. 6. 28 supr.

potestate constare'. Of fictitious real actions an example may be found in the actio Publiciana,[1] in which it was feigned that the period of usucapio had run its full course; personal actions containing some similar fiction may be illustrated by the actio Serviana (Gaius iv. 35), in which the bonorum emptor fictitiously represented himself as the insolvent's heir, and by the actiones furti and legis Aquiliae when brought by or against a peregrinus, where the latter was represented as a civis (ib. 37). Where there was no fiction whatever, nor the slightest trace of one, the action was said to be directa; where there either was a fiction, or some covert reference in the intentio showed that the action lay on the case in question in virtue, not of the substantive law, but of the praetor's quasi-legislative authority as exercised through the Edict, it was said to be utilis. An actio utilis was thus always modelled on an actio directa, civil or praetorian: where this was clear upon the face of the formula, it was actio fictitia; where not, but the derivation was less patent (e.g. in transposition of the parties), it was actio utilis pure and simple. As examples of the latter may be cited the actions brought by the fideicommissarius under the SC. Trebellianum, by the assignee of a chose in action (p. 482 supr.), and that referred to in Gaius iii. 219.

iv. The difference between an intentio in ius and one in factum concepta has already been pointed out. The one affirms hypothetically or indefinitely a *right* belonging to the plaintiff by the civil law,[2] though (in actiones fictitiae) belonging to him thus only by a fiction. By the other, the iudex is directed to inquire, not whether so and so belongs, as of right, to the plaintiff, or whether the defendant is under a civil obligation to do so and so for him; but whether certain alleged *facts* are true, and (if so) to condemn the defendant; and such an intentio is said to be in factum concepta because it does not directly affirm a right, but only a state of facts, though, if the affirmation is found to be true, the implied right is as clearly brought out by the instructions to the iudex as if express reference had been made to it in the formula.

Actions of this kind—in factum conceptae—form the great illustration of the praetorian development of Substantive through Adjec-

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[1] Gaius iv. 36. Cf. the description of this action given in Bk. iv. 6. 4 supr.

[2] E. g. si paret fundum . . . Auli Agerii *esse*, if it be proved that the title to the estate is in Aulus Agerius; si paret . . . Aulum dare *oportere*, if it be proved that he is under an obligation to convey; quicquid paret . . . dare facere *oportere*, whatever it be proved is the content of his obligation.

tive Law. The earliest mode in which the praetor conferred rights unknown to the ius civile was by the employment of fictions. His instructions to the iudex might be paraphrased thus : 'The plaintiff has, by the civil law, no right whatever against the defendant ; but if, supposing so and so were the fact, he would be entitled iure civili, then find for him in any case.' Sir Henry Maine has shown[1] why this expedient was at first adopted in preference to openly altering the law. 'Fictions satisfy the desire for improvement, which is not quite wanting, at the same time that they do not offend the superstitious disrelish for change which is always present. At a particular stage of social progress they are invaluable expedients for overcoming the rigidity of law.' Eventually, however, the praetor discarded his original method, and began to boldly grant independent actions in cases which bore no analogy whatsoever to other relations already protected iure civili. The intentio of such new actions could not allege a *right* in the plaintiff, for there was, *ex hypothesi*, no right by the civil law at all : but it could allege a fact or facts, and the judge could be instructed to find for or against the plaintiff according as he ascertained the allegation to be true or untrue.[2] Actiones in factum conceptae, in short, are not civil law actions at all : they are all derived from the imperium of the magistrate.[3] The formulae of those which were of most frequent occurrence were permanently incorporated in the album ; on these others were modelled, and thus we get actiones in factum directae, and actiones in factum utiles. Most, however, so far as we know them, are in personam, forming a third class of personal actions, co-ordinate with stricti iuris and bonae fidei iudicia. The two latter are easily distinguishable from actiones in factum by their having an intentio in ius concepta—which contains, i. e., the word 'oportere' : but Savigny is of opinion that the more equitable rules and free procedure of bonae fidei actions were applied, so far as was possible, to actiones in factum as well. Under some circumstances, indeed, a plaintiff might proceed either in ius or in factum ; Gaius points out (iv. 47) that this was the case in depositum and commodatum, and possibly pignus was equally privileged. Finally, an ordinary actio in factum,

[1] Ancient Law pp. 26, 27.

[2] For examples of formulae in factum conceptae see Gaius iv. 46, 47, and Keller, Civil Process § 33 d.

[3] Hence the division of actions into civiles (or legitimae) and honorariae (Bk. iv. 6. 3 supr.), the latter being those which were referable solely to the imperium, and had no foundation in the civil law at all ; they consist of the two classes of actiones utiles and in factum conceptae.

which was always of purely praetorian origin, must carefully be distinguished from the actio in factum civilis (or praescriptis verbis), the remedy on an innominate contract. This was one of the bonae fidei actions, all of which, having an intentio incerta (*quicquid* paret), had a demonstratio as well. But it was the function of a demonstratio to technically designate the actual ground of an action (sale, hire, &c.) ; and it was the very essence of an innominate contract that it had no technical name, so that the ground of an action upon it could not be thus shortly set forth. The result was that for a demonstratio was substituted a summary statement of the facts upon which the plaintiff relied, praescripta verba, and the name of the action—civilis in factum—related to this, though the intentio was still in ius concepta.

A third and rare part of a formula (to whose constituent elements we now return) is the Adiudicatio (Gaius iv. 42), which is found only in the formulae of iudicia divisoria, actions demanding a partition of jointly-owned property on behalf of one of the co-owners. Its form is given in the passage of Gaius referred to—quantum adiudicari oportet, iudex Titio adiudicato—and it empowered the iudex not only to divide the subject-matter of the action, but also, where an exact division was impracticable, to establish usufructs and other partial rights in order to redress the inequality. As, however, it could never be certain, *a priori*, that an equal partition would be possible, the adiudicatio seems never to have stood by itself, but in loose combination with a far more important and universal element in a formula, viz. a condemnatio, by which the judge was enabled to impose a pecuniary payment upon one joint owner in favour of another, to whom a smaller than his due portion of the joint property had been awarded.

The Condemnatio is, with very few exceptions, found in every formula, being the clause in which the iudex is instructed to condemn or absolve the defendant according to the truth or falsehood of the plaintiff's allegations. The formulary procedure provided no direct machinery for enforcing on a defendant delivery of specific property, or specific performance of a contract, and consequently the gist of the condemnatio always lay in a money payment (Gaius iv. 48). If the object of the action was a liquidated debt, the condemnatio was said to be certa (ib. 50), and the judge was instructed to condemn the defendant in exactly that amount ; if he awarded a sum either greater or less, he became liable quasi ex delicto, ' ut qui litem suam fecerit ' (Bk. iv. 5 pr. supr.). This kind of condemnatio, mentioning

a specific sum, is found in condictio certi and in actions in factum conceptae which claim a liquidated penalty (as in Gaius iv. 46). In all other actions the condemnatio was said to be incerta, and it was the judge's duty 'litem aestimare', to fix the sum payable by the defendant if the plaintiff succeeded in establishing his case. Even in condemnatio incerta a distinction has to be drawn. It may be absolutely incerta (or, as Gaius calls it in iv. 51, infinita), the judge's discretion in the litis aestimatio being completely unfettered:[1] or, secondly, a maximum may be fixed in the formula, below which the iudex may assess the damages, but which he cannot exceed without exposing himself to the action quasi ex delicto; here the condemnatio was said to be incerta cum taxatione.[2]

Under the head of condemnatio it seems convenient to describe the actio and formula arbitraria. As a general rule, the condemnation of the defendant depends upon one condition only, and that a positive one, viz. satisfactory proof of the plaintiff's right, or of the facts alleged in the intentio: si paret . . . , condemna. But sometimes it was made to depend further on a second *negative* condition, viz. non-performance by the defendant of some specific act, which was introduced into the formula by the word nisi or some equivalent.[3]

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[1] The following are examples. (i) In Real action—si paret . . . Auli Agerii esse, quanti ea res est, tantam pecuniam A. Agerio N. Negidium condemna: si non paret, absolve. (ii) In Personal action—quod . . . , quicquid paret ob eam rem dare facere oportere, eius rei tantam pecuniam condemna: si non paret, absolve.

[2] E.g. Iudex A. Agerio N. Negidium *duntaxat* sestertium x millia condemna. The commonest form of taxatio is where the maximum is fixed in iure by the plaintiff subject to the praetor's approval, as was the case in the actio iniuriae (Gaius iii. 224), and in penal actions in which the penalty depended on the value of an object, e.g. in furtum and rapina. There was, however, a different kind of taxatio in those cases where the defendant was not personally liable for the whole of what is properly the object of the action, but (e.g.) only so far as he has been enriched at the plaintiff's cost, or only so far as a peculium extends (actio de peculio).

[3] For examples of formulae arbitrariae see Mr. Poste's note on Gaius iv. 47. What actions were arbitrariae is somewhat uncertain. Under them we may place without hesitation real actions tried by formula petitoria, and of remedies in personam those praetorian actions which were brought to obtain restitution (e.g. doli, metus): for noxal actions see on Bk. iv. 8 supr. From the fact that bonae fidei actions were sometimes called arbitria, it has been supposed that their formula was always arbitraria. Mr. Poste thinks that only such of them as aimed at restitution (e.g. depositi, commodati, locati, rei uxoriae) were of this character. This view is to some extent supported by the formula (in ius concepta) of the actio depositi in Gaius iv. 47, if the letters there are (as is generally supposed) NR, and mean 'nisi restituat'; but it may be argued with some force that the formula of a bonae fidei action was not arbitraria, because the iudex in such a suit had already, in virtue of his commission to decide the matter 'ex fide bona', all the power which

Such a formula was called arbitraria, because, if the plaintiff established his right against the defendant, the latter had the option of performing the specific act, or in default of being condemned in damages: if he did the former, he was entitled to absolution. Though no defendant could be compelled by this form of action to deliver specific property, or to perform his contracts, yet it was the nearest approach to a specific enforcement made by the formulary system. The mode, however, in which the damages were assessed was specially adapted to induce a defendant to perform the act demanded in preference to paying damages; for the plaintiff was allowed to depose on oath (iusiurandum in litem) as to the value to him of the object claimed, or the pecuniary loss which he would suffer through the other's breach of contract: while in the actio de dolo condemnation also entailed infamia, and in the actio quod metus causa fourfold damages. The tendency seems to have been to favour plaintiffs, and to accept their estimate without qualification, unless it was outrageously unfair, so that the system may be conjectured to have worked with tolerable success.

So far we have been concerned entirely with actions in personam. Excluding the old procedure by sacramentum before the centumviral court, there were two forms of real action, known respectively as formula petitoria and the action per sponsionem. The first was the great type of actio arbitraria, the intentio running ' si paret eam rem Titii esse ex iure Quiritium neque eam rem Gaius arbitratu tuo restituet [quanti ea res erit tanti Gaium Titio condemna ', etc.]. Here the disputed right was tried directly and in the open light, instead of, as in sacramentum and the action per sponsionem, being hidden behind a wager ; and the proceedings in iudicio, if the plaintiff succeeded in proving his case, consisted of a pronunciatio by the iudex in his favour, and an arbitratus (ut reus rem restituat) based thereon ; if the defendant refused or was unable to make restitution, there followed a iuramentum in litem and condemnatio.[1] The action per sponsionem was closely modelled after the old sacramentum, the existence of the right in rem which was at issue being tried as incidental to a right in personam based upon a sponsio. The claimant

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such a formula could give him, including that of absolving the defendant if he satisfied the plaintiff before judgment.

[1] This was the form of action employed in hereditatis petitio, in praetorian real actions (e.g. Publiciana), in suits relating to servitudes (confessoria and negatoria), and perhaps in the actio finium regundorum. It differed from the procedure per sponsionem in the form of satisdatio entered into by the defendant, Gaius iv. 91.

of property challenged his opponent to promise him a sum of money if he could prove his title to it: si homo, quo de agitur, ex iure Quiritium meus est, sestertios xxv nummos dare spondes? (Gaius iv. 93); and it was upon this promise that the suit was brought, so that the action, though its proper and ultimate object was a real right, in form was in personam. To secure delivery of the object, along with its fruits and accessions, in the event of the plaintiff's success, the defendant had personally to give security (pro praede litis et vindiciarum), and the sum promised, being merely trifling, was never exacted, whence its name sponsio praeiudicialis. For the same reason there was no restipulatio by the defendant, as in condictio for recovery of pecunia certa credita.[1]

It remains to notice certain clauses which were sometimes inserted in the formula at the instance of the defendant, viz. exceptiones and praescriptiones pro reo. It was a peculiar rule of the formulary system that the defendant was not allowed to plead some grounds of defence in iudicio unless they had been alleged in iure, and the judge's attention had been expressly called to them by an addition to the formula. Exceptiones are pleas of this character: defences which do not actually traverse the allegation of the plaintiff, but set up a countervailing right, rendering the former of at least no present value, and which, if they are to be successfully pleaded, require (though to a larger extent in some classes of actions than in others) to be tersely embodied in the formula, by an addition to the intentio, instructing the iudex to condemn the defendant only on the fulfilment of two conditions instead of, as usual, one, viz. (*a*) a positive condition, si paret, etc.: (*b*) a negative condition, non-proof by the defendant of

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[1] It was but seldom, as has been observed above, that a formula consisted of all the four ordinary elements (demonstratio, intentio, adiudicatio, condemnatio) already described. The composition of the different classes of formula may be summarized thus:—

(*a*) Those of (1) real actions, (2) personal actions which are certae and in ius conceptae, and (3) actions in factum conceptae, have only intentio and condemnatio.

(*b*) Those of personal actions which are in ius conceptae, but incertae, have, as a general rule, demonstratio, intentio, and condemnatio; the iudicia divisoria, which belong to this class, have an adiudicatio as well.

(*c*) Praeiudicia (for which see Gaius iv. 44) have only an intentio. Thus

The Demonstratio never stands alone: it occurs only in personal actions which have an intentio incerta in ius concepta, and a civile nomen (for in default of this its place is supplied by praescripta verba, v. 651 supr.).

The Intentio is found in every formula.

The Adiudicatio occurs only in formulae of iudicia divisoria; and

The Condemnatio concludes every formula except those of praeiudicia, but cannot stand alone.

his plea in defence. Thus the material nature of an exceptio is that it is a plea of a countervailing right; its form is that of a negative condition of the condemnatio, introduced by the words 'si non' or an equivalent; and its place in the formula is between the intentio and the condemnatio. A simple illustration is found in the exceptio pacti (Gaius iv. 116); e. g. Aulus owes Titius money, for which the latter promises not to sue, and then nevertheless brings his action; Aulus would repel him by the exceptio 'si inter Aulum et Titium non convenit ne ea pecunia peteretur'. The usual Roman classifications of exceptiones are noticed in the text (Bk. iv. 13) and commentary; the answer to the question, in what classes of actions this peculiar rule had the widest operation, depends on the character of the intentio. The more special and definite the intentio, the more likely was it that the defence would consist in the allegation of a countervailing right rather than in a direct traverse of the plaintiff's claim. In real actions, accordingly, it was the rule that defences other than a simple denial of the intentio must be expressed in the formula. In personal actions a distinction must be drawn. In condictio the same rule applied; but in bonae fidei iudicia the intentio claimed only what the defendant owed ex fide bona, so that any defence which alleged want of good faith on the plaintiff's part was practically a complete traverse of the latter's claim, and so need not be introduced into the formula as an exceptio. This the Romans expressed in the maxim 'doli exceptio bonae fidei iudiciis inest'; which may perhaps be expanded into a general rule, that in bonae fidei actions defences by way of countervailing right need not be alleged in iure so far as they were grounded on equity and bona fides, but only where they were based on the ius civile, or on rules of procedure.[1]

Sometimes the plaintiff could meet an exceptio by an answer of the same kind; he did not deny its truth, but set up a second countervailing right of his own—an exceptio to an exceptio. This was called a replicatio, and was inserted in the formula by the words 'aut si', or an equivalent. And this kind of sparring between the parties might lead further to a duplicatio, a triplicatio, and so on; illustrations of which will be found in Gaius iv. 126–129: cf. Bk. iv. Tit. 14 supr.

Praescriptiones pro reo do not differ substantially from exceptiones. In the earlier part of the formulary period many defences by way of

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[1] See Keller, Civil Process § 25. In this respect actions with a formula in factum concepta do not seem to have been on the same footing with those which were bonae fidei.

countervailing right were clothed in a peculiar form, being placed at the head of the formula, after the appointment of the iudex, whence their name praescriptiones. This was frequently the case when the defendant's contention was that the action ought not to be tried at all, because it would prejudge a 'causa maior' (praescriptio praeiudicii); and the purpose of thus placing the objection in the foreground was to indicate to the iudex that he was first to examine into its truth or falsehood, and, if he found it well grounded, to suspend the hearing until it was removed by the decision of the larger suit. Other objections of the same character were that the action was beyond the competence of the court (praescriptio fori), or was barred by lapse of time (praescriptio temporis); and the actual form they took was the same as that of praescriptiones pro actore (p. 644 supr.), viz. ea res agatur, etc.: see Gaius iv. 133. The practice of formulating such objections merely as exceptiones had commenced as early as Cicero (de Invent. ii. 20), and Gaius tells us (iv. 133) that in his time praescriptiones of this kind were entirely obsolete: in speciem exceptionis deducuntur. The change was material; for now, if the defence was established, the defendant was entitled to acquittal; whereas before, when it took the form of a praescriptio, the hearing was sometimes only suspended, and he might be condemned after all.

The proceedings in iure may now be imagined at an end. Their object was to formally define the issues to be tried in the action; to give a legal form to a dispute which had hitherto existed only as a matter of fact. When this had been done, and the formula finally drawn up, the magistrate had no more to do; he was said 'iudicium dare', the 'res' was 'in iudicium deducta'; probably, as Lenel supposes, the plaintiff recited to the defendant the formula received from the praetor in the latter's presence: the iudicium was then said to be acceptum. This stage in the proceedings, at which the action passed from praetor to iudex, or, according to Roman ideas, at which it first became an action at all, was called litis contestatio; no longer a solemn appeal to witnesses, but merely a name retained for convenience sake from the older system to mark a moment most eventful for the parties, and attended by important consequences which are described in detail by Mr. Poste.[1]

[1] Note on Gaius iii. 180. Briefly, the effects of litis contestatio in the formulary period are as follow:—

(1) It in effect consumes the plaintiff's right of action: res in iudicium deducta est, and de eadem re bis experiri non licet. (2) It operates quasi-contractually to engender an obligation, binding on them, to abide by the iudicium whatever its

Of the proceedings in iudicio Gaius gives us no information; they consisted, of course, of evidence and argument, and may be passed over in favour of matters of which we have more accurate knowledge. Assuming, however, that they terminate in a sententia for the plaintiff (condemnatio), two new questions present themselves. Firstly, is the judgment final? or is there any system of appeal? And, secondly, how is the defendant compelled to pay the money in which he has been condemned? in other words, what are the proceedings in a Roman execution?

The strictly co-ordinate authority of the 'magistratus maiores' in republican Rome excluded the possibility of a true appellate jurisdiction in the pre-imperial period. At that time, in fact, the sententia of a iudex did not admit of revocation or alteration save by the process of in integrum restitutio (note on Bk. iv. 6. 33), though it must be remembered that judgment in an ordinary action was not absolutely final; for the defendant, who was presumptively condemnatus, could contest its validity by refusing to pay the sum in which he had been condemned, and defending himself, at the risk of condemnatio in duplum, against the actio iudicati brought for its recovery. This, however, was not an appeal, which implies the rehearing of the suit by a higher tribunal. With the fall of the Republic a regular appellate jurisdiction was rapidly developed, and the privilege of 'appealing unto Caesar' was soon understood to be common to citizens of Rome all over the Empire. Under Augustus the praefectus urbi was judge of appeal for Rome, and a vir consularis, though sitting in the capital, bore the same relation to each of the provinces. Nero invested the Senate with a supreme appellate jurisdiction co-ordinate with his own, and by the time of M. Aurelius the right had been established of appealing from the sententia of a iudex to the magistrate who appointed him. Thus the tribunals had gradually arranged themselves in a definite series of higher and lower instance, and a suit might be carried from iudex to Emperor through the appointing municipal magistrate, the praetor or praeses, and the praefectus urbi or praetorio in succession. The procedure on appeal was that which will shortly be described as

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result. (3) It interrupts limitation of the right of action. (4) It affects the amount of the condemnation by being supposed to be followed immediately by judgment: see Poste, p. 425. (5) It converts the object of the suit into 'res litigiosa', and thus makes its alienation unlawful pendente lite, Gaius iv. 117. (6) It prevents any subsequent change in the parties without complete reconstruction of the formula (Translatio).

'extraordinaria', dispensing, in its commencement, with the ordinary institution by formula, and terminating in a decretum, not a sententia; definite periods of time were prescribed within which the appeal must be lodged, and its various stages completed. A powerful check on rash appeals was the obligation of the appellant to pay quadruple costs to his opponent if he failed, in addition to a penalty equal in value to one third of the object in dispute.

The simplest mode of executing a judgment for a liquidated sum would seem to be to seize, by state agency, a sufficient amount of the debtor's property, and from the proceeds of its sale to satisfy the creditor's claim; should his property be insufficient, to make him a bankrupt. Putting aside the exceptional application of pignoris capio in the legis actio period, this distinction between execution for debt and execution in bankruptcy was not recognized by the Romans until the Empire. If a man would not satisfy a judgment which had been recovered against him, there was no alternative but to proceed as in a case of genuine insolvency. For a very long while indeed the Romans did not even allow at all that direct and immediate execution upon a debtor's property which seems the natural and reasonable mode of satisfying a creditor's claims: with true legal conservatism they clung closely to the conception of an obligation as a *personal* right, a right which availed only against the debtor's person, and not against property of any kind: for immediately it conferred any right against the property, it ceased, *pro tanto*, to be an obligation. It is the person, they said, who is obligatus, and it is the person to whom the creditor must look to be paid; there is no execution except personal execution, and it is for the debtor to say whether he will save himself by sacrificing his property.[1]

The earliest execution procedure is that of manus iniectio as regulated by the Twelve Tables, which is described at length by Mr. Poste in his note on Gaius iii. 77. As has already been observed, its severity was mitigated by a lex Poetelia, and no doubt indirectly by the lex Aebutia; in its milder form it is in full operation under the formulary system, during which the damnatus in an actio iudicati, if the debt remained unpaid for thirty days, was brought before the magistrate, and unless he discharged it at once, or gave security 'iudicatum solvi' through a vindex who undertook his

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[1] As to the greater antiquity in the Roman system of personal execution, which is denied by Savigny, see note on Bk. iii. 12 supr. Girard thinks that the property of the debtor sold or put to death under manus iniectio went to the creditor: but he cites no evidence in support of his view.

defence, he was ' addictus ' to the creditor, and remained in a condition of quasi-servitude until by his own labour or the intervention of friends the debt was extinguished.

As distinct from this personal execution, execution against the property was first employed only in the case of debts owed to the state. If a man were condemned upon a criminal charge to a pecuniary penalty, and refused or was unable to pay, the praetor would grant possession of his estate to the quaestors, who sold it to the highest bidder (sector). This principle was first extended to private debts by a praetor called, according to Gaius (iv. 35), Publius Rutilius, apparently the Rutilius who was consul B. C. 105, after whose reform ' Proprietary ' execution was called bonorum emptio or venditio.[1] The procedure is fully described by Mr. Poste in the note already referred to. The creditor or creditors were put in possession of the bankrupt's estate by the praetor ; then, at fixed intervals, followed three decrees : the first advertising the sale, the second authorizing the creditors to choose from among themselves a ' magister ' to superintend it, and the last enabling them to publish the leges or conditions under which it would take place. Finally, after a third interval, the estate or universitas iuris was put up to auction, and knocked down to the highest bidder, i. e. the person who practically offered the creditors the highest percentage on their claims, and who was regarded, by a fiction, as the bankrupt's heir, in which character he sued the debtors of the estate ; or, as an alternative for this fiction, he might employ the formula Rutiliana (Gaius iv. 35), in which he was represented as the insolvent's agent, the insolvent being named in the intentio, and himself in the condemnatio. These proceedings did not exempt the after-acquired property of the bankrupt from the claims of his creditors, who could take action against him repeatedly until they had been satisfied in full ; and in consequence of them he became infamis. For many years creditors seem to have had the privilege of choosing between the two systems, the debtor having no means of saving himself from the semi-servitude of the older procedure if his adversary preferred it to bonorum venditio ; but by the introduction of cessio bonorum, under one of the first two Caesars, this ceased to be the case under ordinary

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[1] The acts of bankruptcy, as they might be called, upon which bonorum venditio lay are specified by Gaius (iii. 78), the cases being those of a debtor absconding (latitans) or indefensus, a judgment debt unsatisfied for thirty days, and decease of the debtor leaving no lawful successor civil or praetorian.

circumstances. The nature of cessio bonorum has already been described in the note upon Bk. iii. 12 supr.

It has been observed that (apart from certain exceptional cases under the legis actio procedure) we meet with no execution for *debt* proper until the Empire. It then became usual for the magistrate, upon the application of a judgment creditor, to send an officer of the court (apparitor, viator) to seize as much of the debtor's property as would cover the debt. This was held for two months by way of pledge or security, at the end of which, in default of payment, it was sold, the debt discharged, and the surplus, if any, returned to the debtor. This is not unfrequently called pignoris capio (e. g. Cod. viii. 23 'si in causa iudicati pignus captum sit'). Another change in this department of law is found in the procedure in actiones arbitrariae for exhibition or restitution. The defendant was no longer allowed to retain the object on condition of paying damages; the plaintiff could demand direct execution of the judicial arbitratus manu militari, the defendant being condemned only in a sum equivalent to fruits and accessions consumed or wasted. We read of this first in Ulpian, and it seems to have come into use only quite at the end of the formulary period: how far the principle was applied to the specific performance of contracts is uncertain.

Though the 'ordo iudiciorum privatorum', or system under which judicial proceedings were divided between magistrate (ius) and iudex (iudicium), was the regular mode of trying suits for centuries after the practical abolition of Statute-Process, cases not unfrequently occurred which the praetor reserved altogether for his own cognizance, and heard throughout and determined without reference to a iudex; in these the cognitio was said to be 'extraordinaria', i. e. outside the 'ordo' or usual procedure. At first such cases were those only in which a iudicium proper was impossible, or at any rate would in some degree have shocked the Roman sense of what was fit and proper, on account either of the nature of the application, or of the relation between the parties; e. g. complaints of slaves against their masters, freemen against their patrons, children against their paterfamilias, and pupils against their guardians, especially in respect of maintenance, claims for fees (honoraria) irrecoverable at law, and fideicommissa. A petition addressed to the praetor on any of these matters was properly called persecutio; the other party was summoned before him by one of his lictors, and, though incidental points (e. g. aestimationes and questions of account) were often referred to arbitri for examination and report, he heard and determined the

matter in person. The decision was called decretum, not sententia, a distinction whose significance will be readily comprehended; a decretum depended for its effect and validity on the imperium, not the iurisdictio, of the magistratus decernens; accordingly it was not necessarily binding on any other magistrate who was not his political subordinate, and therefore was in effect subject to revocation and revision by others as well as by himself.[1]

The constant tendency of the praetor to enlarge the sphere of his extraordinaria cognitio, after the establishment of the Empire, at the expense of the regular procedure by formula, paved the way to the total abolition of the latter. An even stronger influence, which was perpetually working against the ordo iudiciorum privatorum, was the new appellate jurisdiction; for, as has been observed, formulae were employed only in courts of lowest instance.[2] Eventually the formulary procedure was abolished by Diocletian, A. D. 294, magistrates being compelled to hear and decide suits themselves through all their stages; and even when, from stress of business, they were obliged to refer an occasional action to a iudex, their relation to the latter was no longer that of the older system; the proceedings were no longer divided between ius and iudicium, but the whole of them were delegated; magistratus and iudex, so far as the administration of justice is concerned, are interchangeable terms. As is observed by Mr. Poste,[3] the libellary procedure in use in the time of Justinian was essentially the same as cognitio extraordinaria.[4]

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[1] For one very important branch of the extraordinaria cognitio (in integrum restitutio) see note on Bk. iv. 6. 33 supr.

[2] A sure index of the increasing activity of the extraordinaria cognitio is the frequent use of the expression 'iudex pedaneus' (χαμαιδικαστής, Theophilus) by the classical jurists. This originated in the practice of calling the magistrate himself 'iudex', which was only natural when he took to personally hearing and deciding many actions; 'index pedaneus' is the iudex instructed by formula.

[3] Gaius p. 631.

[4] Cf. Bk. iv. 15. 8 supr. Several topics which are of importance in the formulary procedure have been omitted in this Excursus because they demand discussion under the later system as well, and consequently are touched upon in the notes to the text of Bk. iv: e.g. Processual Agency, Title 10; Satisdatio, Title 11; Limitation and Pendency, Title 12; Interdicts, Title 15; Restraints upon reckless litigation, Title 16.

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